TRANSCRIPT

OF

RECORD

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Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 167

W. C. TUCKER, PETITIONER,

vs.

ACEL C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 24, 1927

CERTIORARI GRANTED MARCH 7, 1927

(32,417)

(32,417)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 850

W. C. TUCKER, PETITIONER,

vs.

ACEL C. ALEXANDER, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. a] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on James A. Ingraham, omitted in printing.

[fol. 2]

IN UNITED STATES DISTRICT COURT, WESTERN OKLAHOMA

Writ of Error

United States of America, ss:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Oklahoma, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the Special May Term, 1925, thereof, between W. C. Tucker, plaintiff, and Acel C. Alexander, Collector of Internal Revenue, defendant, a manifest error hath happened, to the great damage of the said W. C. Tucker as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the Office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 18th day of September, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 20th day of July, in the year of our Lord one thousand nine hundred and twenty-five.

Issued at office in Guthrie, Oklahoma, with the seal of the District Court of the United States for the Western District of Oklahoma and dated as aforesaid.

Harry L. Finley, Clerk of the District Court of the United States, Western District of Oklahoma. (Seal United States Dist. Court, Western Dist. of Oklahoma.)

Allowed by John H. Cotteral, Judge.

[fol. 3] Return to writ of error omitted in printing.

In United States District Court

No. 2990

W. C. Tucker, Plaintiff,

vs.

Acel C. Alexander, Collector of Internal Revenue, Defendant

Petition—Filed October 7, 1924

Comes now W. C. Tucker, the plaintiff above named, and for his cause of action against Acel C. Alexander, Collector of Internal Revenue, the defendant above named, alleges and says:

(1) That the plaintiff resides at Pawhuska, Osage County, Oklahoma, in the Western District of said State, and the defendant resides at Oklahoma City, Oklahoma County, Oklahoma, in the Western District of said State, and is, and was at all times herein mentioned, Collector of Internal Revenue for the United States for the District of Oklahoma.

(2) That some time in the year 1923 additional income tax for the year 1920 in the sum of $8,610.84 was assessed against the plaintiff by the Commissioner of Internal Rev-

enue under the Revenue Laws of the United States; that on or about the 5th day of October, 1923, the plaintiff received from the defendant a notice and demand in writing for the payment of said additional tax, which notice and demand was dated October 4, 1923, and notified the plaintiff that if payment of said tax was not made within ten [fol. 4] days after the date thereof a penalty of 5 per cent of the amount of such tax would be added, plus interest at the rate of 1 per cent a month, a full, true, and correct copy of which notice and demand is hereto attached, marked Exhibit A, and made a part hereof; that pursuant to said notice and demand, and in order to avoid the penalty and interest to be imposed for failure to pay said tax, and also in order to avoid the issuance of a distraint warrant for the collection thereof and a levy upon and sale of his property, the plaintiff paid the said sum of additional tax to the defendant as Collector of Internal Revenue for the United States at Oklahoma City, Oklahoma, under protest, on October 30, 1923, and took his receipt therefor, a full, true and correct copy of which receipt is hereto attached, marked Exhibit B, and made a part hereof; and that said additional income tax was erroneously and illegally assessed against and collected from the plaintiff and was paid by the plaintiff under protest after demand and with threat of penalty for failure to pay the same.

(3) That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300 shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed in specie to its stockholders by a liquidating dividend; that the net

actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and [fol. 5] illegally assumed and took $356.86 per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders; that this erroneous, wrongful and illegal action of the Commissioner distorted and exaggerated the true and actual net income of the plaintiff and made it appear that he had a total net income of $65,698.58 for the year 1920, whereas, he had in fact a total net income of only $40,975.90 for said year; that in his income tax return for said year he did not claim or take said loss of $5,491.84 sustained on liquidation of said corporation at a deduction from income, but included said sum in his income and returned net income subject to tax in the sum of $46,467.74 and computed and paid the tax thereon in the sum of $5,172.92 as provided by law; that the Commissioner took said erroneous and exaggreated sum of $65,698.58 as the plaintiff's net income for said year and computed and assessed said additional tax thereon; and that, therefore, said additional tax was excessive and was erroneously and illegally assessed and collected.

(4) That on the 2nd day of November, 1923, the plaintiff filed with the Commissioner of Internal Revenue his claim for refund of the said sum of additional tax so erroneously, illegally and wrongfully assessed, collected and paid, which claim for refund was in due form of law and upon the form prescribed therefor by said Commissioner, and a full, true and correct copy of the same is hereto attached, marked Exhibit C and made a part hereof; and that

more than six months have elapsed since the filing of said claim with said Commissioner and he has not rendered a decision thereon.

Wherefore, the plaintiff prays that he have and recover of and from the defendant a judgment for the sum of $8,610.84 with interest thereon at the rate of 6 per cent per annum from the 30th day of October, 1923, and the costs of the action.

Chas. H. Garnett, Attorney for Plaintiff.

[fol. 6] "Exhibit A" to Petition

Income, War-profits, and Excess-profits Tax

Notice and Demand for Tax

Form 7658

United States Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of 5 per cent of the amount of tax due will be added, plus interest at the rate of 1 per cent per month, from Oct. 15, 1923, until paid.

Date: Oct. 4, 1923.

To avoid penalty and interest this tax must be paid to the Collector of Internal Revenue at Oklahoma, Okla. not later than Oct. 15, 1923.

Date: —— —, ——. Collectors Paid Stamp.

To the Collector of Internal Revenue:

I enclose herewith the sum of $— in payment of the tax shown below.

—— ——,
—— ——.

Name and Address: Tucker, W. C., Pawhuska, Okla.
Sept. 97.

Items: Additional 1920 tax disclosed by audit in Washington.

Total Assessment: 8,610.84.

[fols. 7 & 8] "Exhibit B" to Petition

Treasury Department, United States Internal Revenue

Form 1107

Notice to Taxpayer

Before presenting payment to cashier enter on this form (a) Name, (b) Address, (c) Form number of return, (d) Amount of tax paid.

Taxpayer's Receipt for Income and Excess Profits Tax

Office Collector Internal Revenue

CK.
Paid under protest.
Form No. of return Com'r's 23a.
Sept. 97—Addl. 1920 Tax, $8,610.84.
Name: W. C. Tucker.
Address: Pawhuska, Oklahoma.
Received Payment 10-30-23.
Axel C. Alexander, Collector of Internal Revenue, by M. Haws, Cashier.

(Here follows "Exhibit C" to Petition, marked side folio pages 9 and 10)

[fol. 11] In United States District Court

Answer—Filed February 9, 1925

Comes now the defendant above named, and for answer to the petition of the plaintiff herein, denies each and every allegation therein contained.

Roy St. Lewis, Attorney for the Defendant.

EXHIBIT C TO PETITION

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Claim For

- Abatement of Tax Assessed
- Credit Against Outstanding Assessments
- Refund of Taxes Illegally Collected
- Refund of Amounts Paid for Stamps Used in Error or Excess

Collector's Notation

District

Account number

Date received

Stamp here

.....
Collector of Internal Revenue

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of Oklahoma,
County of Osage. } ss:

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Stamp here

Type or Print

.....W. C. Tucker,.....
(Name of taxpayer or purchaser of stamps.)
.....Pawhuska, Oklahoma. .....
(Residence—give street and number as well as city or town and State.)

.....
(Business address.)

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

___ Credit Against Outstanding Assessments

___ Refund of Taxes Illegally Collected

___ Refund of Amounts Paid for Stamps Used in Error or Excess

Account number

Date received

Stamp here

Collector of Internal Revenue

State of Oklahoma, } ss:
County of Osage.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Stamp here

Type or Print

W. C. Tucker,
(Name of taxpayer or purchaser of stamps.)

Pawhuska, Oklahoma.
(Residence—give street and number as well as city or town and State.)

(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From Jan. 1,	1920
	To Dec. 31,	1920

1. Business in which engaged General Merchandise
2. Character of assessment or tax Income Tax
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased ... $13,783.76
4. Reduction of Tax Liability requested (Income and Profits Tax) ... $ 9,301.23
5. Amount to be abated ... $...None
6. Amount to be refunded (or such greater amount as is legally refundable) ... $ 9,301.23
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) $5172.92 Installments in 1921
(If statement covers income tax liability, items 8–11, inclusive, must be answered.) $8610.84 Paid 10-30-23
8. District in which return (if any) was filed Oklahoma.
9. District in which unpaid assessment appears No unpaid assessment ... $ None
10. Amount of overpayment claimed as credit ... $ None.
11. Unpaid assessment against which credit is asked; period from ... to ...

Deponent verily believes that this application should be allowed for the following reasons:

That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said Company as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax, dated August 10, 1923, designated IT: PA: FR-JRC-708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim. Said appeal was not considered in the assessment of the additional tax because not filed in time, and the taxpayer was advised by the Commissioner's letter of October 24, 1923, a copy of which is attached hereto and made a part hereof, that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence. The additional tax of $8,610.84 was paid under protest on October 30, 1923. The taxpayer is, therefore, entitled to interest on the tax refunded from the date of payment.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 1st day of November, 1923

Signed: W. C. TUCKER

LOIS HAYNIE,
Notary Public.
(Seal) (Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

Endorsed: Filed in the District Court on October 7, 1924.

9-10

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed July 20, 1925

CAPTION

Now on this 13th day of June, A. D. 1925, the above entitled and numbered cause comes on to be heard before Honorable J. H. Cotteral, Judge of said court, a jury having been waived by the parties.

APPEARANCES OF COUNSEL

The plaintiff is represented by C. H. Garnett, Esq., of Oklahma City, Oklahoma.

The defendant is represented by Floyd E. Toomey, Esq., special attorney Bureau of Internal Revenue, and James A. Ingraham, Esq., Assistant United States Attorney.

Both sides announcing ready for trial, the following proceedings were had as follows, to-wit:

ARGUMENT OF COUNSEL

Opening Statements

Mr. Toomey: This is a case where the Osage Mercantile Company, a corporation at Pawhuska was organized in 1902. The plaintiff in this case is a stockholder, and he was, I think, from the beginning of that corporation to its liquidation in 1920, and the tax involved here is an individual tax of a stockholder in the Osage Mercantile corporation. The corporation continued in existence until 1920 at which time it dissolved and liquidated, and the assets of the corporation—I might say from 1914 on I believe the Osage Mercantile Company was owned by two stockholders, W. C. Tucker, the plaintiff in this case and his brother. In 1920 they dissolved the corporation, and W. C. Tucker and his brother continued business as a partnership, the Osage Mercantile Company, continued it at the same place, same

business and under the same name and same management. The tax question arises in this way: It is the determination of the taxable income received by W. C. Tucker one of the stockholders of this corporation by having received his partnership share of the liquidated assets of this corporation. The case really arises I think under Section 201 and sub-division (c) of the Revenue Act of 1918 which provides [fol. 12] that amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares and shall be taxed to the distributee the same as other gains or profits. Now that section of the law simply throws it over onto the general proposition, that is, where a taxpayer had assets prior to March first, 1913 the effective date of the 16th amendment, which he sells or converts subsequent to March first, 1913, the taxable gain, is the difference between the value of the property on those two dates, so in this case the disputed question involved is, what is the next taxable income of W. C. Tucker arising out of his receiving his proportionate share of the liquidated assets of the Osage Mercantile Company in 1920, and to arrive at that we have to arrive at it as of March first, 1913, the value of those assets and subtracting that from the value of those assets at the date of liquidation in 1920. Now that is very simple, but the legal question in this case, the big legal question is the proper means of arriving at that March first, 1913 value, and the evidence will be something like this, in order to get the controversy clearly before the court. On March 1st, 1913, the assets of this Osage Mercantile Company or corporation were divided really into two corporations, or parts. There was a mercantile business proper and real estate. I think the evidence will show that the value of these two parts of the business were about equal. On May 8th, 1913, three months later, they take out of the business and take away from this Osage Mercantile corporation all of its real estate and transfer it to a newly formed corporation. I think it was done in order to comply with the Oklahoma laws prohibiting a mercantile company from holding real-estate. Now in arriving at the March 1st value of the assets of this corporation we have deducted the value of this real estate feature of the business which was taken away from the corporation, and that is practically the only legal question in

this case, is whether or not in arriving at the March first value of this corporation's assets, the Government proceeded properly in deducting from that value of the real estate which was taken away from the corporation three months later. This real estate was transferred over and they called it the Mercantile Real estate corporation. This continued in existence and is in existence today owned by the same stockholders in the same proportion to their holdings in the Osage Mercantile Company. The Mercantile Company liquidated in 1920, but the real estate company continued in existence so what they did was to liquidate just the mercantile feature of the business and they are seeking [fol. 13] in determining the taxable gain to be derived from that liquidation to take away from it the real estate from the Mercantile Company's value as of March 1st, 1913 which we contend would be allowing them a double deduction. It would be allowing them to take out in 1920 something of the business which they still have. That roughly speaking is our position. Perhaps I haven't made myself clear, but I think it will unfold from the evidence and will perhaps be clear to the court as we go along.

Opening Statement for Plaintiff

Mr. Garnett: The statements of Mr. Toomey, I think, are in the main correctly made, but there are a few matters he is in error on. In the first place, in 1913, the stockholders were some seven or eight in number, Mr. Ferguson, Mr. Hutchins, Mr. Mosier, Mr. Mathews and the Messrs. Tuckers, two of them. Mr. Mosier's stock was disposed of in 1914. The other stockholders held their shares until 1920. It never passed into the entire ownership of Messrs. Tucker until in 1920. The real estate in 1913 was just a little more than one third of the value of the assets of the corporation as shown on their books. It was perhaps two-fifths of it as shown on their books. Now about May in 1913 this real estate was distributed in the form of a dividend, the facts being that it was transferred to another corporation known as the Mercantile Real Estate Company and charged off the books of the Osage Mercantile Company as a dividend to stockholders. The stock in the

Mercantile Real Estate Company was issued to the stockholders of the Osage Mercantile Company in the same proportion as their stock holdings in the latter company. I think the Mercantile Real Estate Company is still in existence perhaps with some changes in stock ownership; at least one of the stockholders died. Now it is the contention of the plaintiff that this distribution of real estate was a dividend at that time and declared out of accumulations prior to March first, 1913. There were also some cash dividends declared in the early part of 1913 out of earnings prior to March first of that year. They amount to a little over $5,000, about $5,800. There was $9,000 in dividends declared up to May of that year, but part of that, or about half of it was paid out of current earnings and the amount as set up in the revenue agent's report on which additional tax was assessed is about $5,800 paid out of the previous earnings. Now the tax involved here is an [fol. 14] additional assessment that was paid in the fall of 1923 in the sum of $8,610.84. The evidence will show the tax payer, Mr. Tucker, in making his returns in 1921 showed his income as he claimed it exclusive of any profit in the liquidation of the Osage Mercantile Company. The Collector on his return stated that the tax was erroneously calculated. The earnings, in that the earnings in the partnership were listed as dividends in a corporation and were not subject to the normal tax of eight per cent. If they had been dividends they would not have been subject to this tax but being earnings in a partners-ip, as the facts were they were subject to the tax. That made an additional tax liability of $1,968.71. The tax shown and paid on his return was $5,172.93, so that his true tax liability on his return was $7,141.63. The total tax payments, the first assessment and the additional assessment aggregated $13,783.76, and deducting the admitted tax liability of plaintiff on that makes $6,642.13 which is the amount in controversy here. That is the maximum amount of recovery with interest from date of payment which is October 30, 1923. Now the claim for abatement and refund was duly filed, and after this suit was filed in April of this year, the Commissioner wrote a letter to the tax payer stating he was allowed a refund of $216 and some cents on a retake it that is a minimum of recovery which the tax payer is entitled to.

In regard to the amounts distributed in the dividends, it is the contention of the plaintiff that those dividends cannot be used to reduce the March first value of the stock. They cannot be treated as liquidating dividends, the corporation continuing in business, the same officers at the same place and continuing a profitable business down to July 1920. If on the other hand as stated by counsel—this indicates to me a new angle in the case—I had not known of that position until counsel stated it—if it is to be considered that this real estate was not actually a dividend, only just a transfer of the property to the same persons in another form, to form another corporation, and they are deemed as still holding it, then in that event it cannot be taken into account as having been realized upon, and they cannot be charged with having received the value of that real estate in the liquidation of the March first value of the stock, so I take it on either view of the nature of that real estate distribution that the proposition of law we contend would be the same. That that was not a realization at all of March first value. The remaining question will be as to good will. This corporation earned quite large profits in proportion to [fol. 15] its capital. Organized in 1902, it started with $15,000 capital in 1902. In 1906 that was increased by a stock dividend to $30,000, a hundred per cent dividend being declared, and its earnings from the period of its organization to March first, 1913 on a capital of $30,000 for the entire period would exceed 50 per cent, taking into account appreciation in value of the real estate. It is claimed it had a good will value then and that it had a good will value at the time of liquidation. The evidence may show those good will values were substantially the same, but it will be contended for the plaintiff that good will is not an asset that can be distributed to stockholders in liquidation of a corporation and they made chargeable with the value of it. That when a corporation liquidates its good will may not be sub-divided among its several stockholders whether they be two or more and be treated as having been received by them in liquidation. This was a liquidation and distribution in kind. The assets were not sold but were taken over by the stockholders consisting of merchandise, furniture and fixtures and so forth, and not converted into cash and distributed, but it was distributed in specie or in kind. I think that covers the plaintiff's contention.

W. C. TUCKER, the plaintiff, was thereupon called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. You may state your name.
A. W. C. Tucker.
Q. You are the plaintiff in this action?
A. I am.
Q. Where do you reside?
A. Pawhuska, Oklahoma.
Q. How long have you lived there?
A. Since 1888.
Q. What is your business?
A. I am a merchant.
Q. Have you been in the mercantile business all that time?
A. Yes, sir. As a clerk and later as an owner.
Q. Were you one of the organizers of the Osage Mercantile Company?
A. Yes, sir.
Q. When was it incorporated and started in business?
A. In 1902.
Q. What was its capital stock to begin with?
A. $15,000.
Q. Was that capital stock afterwards increased?
A. It was increased to $30,000 in 1906 by a stock dividend.
Q. A stock dividend of 100 per cent?
A. Yes, sir.
Q. Declared from earnings up to that time?
A. Yes, sir.
Q. Was its capital stock ever increased after that?
[fol. 16] A. No, sir.
Q. Remained at $30,000?
A. Yes, sir.
Q. Up to March 1st, 1913, what was the percentage approximately of the earnings of the company from the period of its organization to that date?
A. I think it would run better than fifty per cent on a capitalization of $30,000.
Q. Fifty per cent per annum on $30,000?

A. Yes, sir.

Q. In arriving at that do you take into account the appreciation in value of real estate?

A. Yes, sir.

Q. Had the company acquired real estate from 1902 to 1913?

A. It had.

Q. Where was that real estate situated?

A. In Pawhuska.

Q. Had it acquired it at the same time or at different times?

A. At different times. The bulk of it was acquired in 1916, at what we call the town lot sale, at the time the Osage Indian lands were allotted and town lots were sold.

Q. Some of it was acquired later?

A. Yes, sir.

Q. Was it in several different tracts?

A. Yes, sir.

Q. Now what was the cost of that real estate as carried on the books of that corporation?

A. When?

Q. Well, on March 1st, 1913?

A. $50,150.

Q. Was there any indebtedness against it?

A. Yes, sir, $10,000.

Q. Then the net investment in real estate on that date was $40,150?

A. Yes, sir.

Q. Now have you examined the revenue agent's report of an investigation of your tax liability made under date of June 5th, 1922, a carbon copy of which was furnished you?

A. Is that what is known as the Dye report?

Q. Yes.

A. I have.

Q. It was made by Mr. Dye as revenue agent?

A. Yes, sir.

Q. Sydney O. Dye, isn't it? It shows to have been made September 1st by the inspector and transmitted by the revenue agent in charge at Oklahoma City. Now that report in Schedule 1-B shows capital and surplus March 1st, 1913, $107,059.91. Is that correct as shown by the books?

A. It is.

Q. In that statement of capital and surplus the real estate is included at its book value?

A. Yes, sir.

Q. Now Mr. Tucker, were any dividends declared soon after March first, 1913?

A. Yes, sir.

Q. What were they?

[fol. 17] A. On March 4th, there was a dividend of $3,000.

Q. Was that paid in cash?

A. Yes, sir.

Q. And this Schedule 1-B of the agent's report I refer to shows dividend 4-1-13. That would be April first?

A. Yes, sir, $3,000.

Q. In cash?

A. Yes, sir.

Q. And another dividend on 5-8-13. That would be May 8th of $3,000?

A. That is correct, $3,000 cash.

Q. Those were distributed in cash.

By the Court: That is three dividends is it?

Mr. Garnett: Yes, sir; $3,000 each.

By the Court: What year?

Mr. Garnett: 1913. The first of those dividends was March fourth.

Q. Was any disposition made of the real estate in 1913?

A. Yes, sir. In May, 1913, the real estate was turned over to the stockholders of the Mercantile Real Estate Company who were the same stockholders as the Osage Mercantile Company, the merchandise end of it.

Q. Was that under date of May 13th?

A. Yes, sir.

Q. 1913?

A. Yes, sir.

Q. What was the Mercantile Real Estate Company?

A. The Mercantile Real Estate Company was a corporation authorized to do business in the State of Oklahoma for the purpose of owning and operating in real estate in Oklahoma.

Q. Who were the incorporators and stockholders?

A. W. S. Mathews, W. T. Mosier, G. W. Hutchins, J. M. Ferguson, R. W. Tucker, my brother, and myself.

Q. Were those men you named the same men who were stockholders in the Osage Mercantile Company?

A. They were.

Q. Did they receive stock in the Mercantile Real Estate Company in the same proportion as their stock holdings in the Osage Mercantile Company?

A. Yes, sir.

Q. What was done with the item of real estate on the books of the Osage Mercantile Company?

A. It was closed by charging it to undivided profits.

Mr. Toomey: Are those books in the court room?

A. Yes, sir.

By Mr. Garnett:

Q. Was the real estate itself deeded by the Osage Mercantile Company to the Mercantile Real Estate Company?

A. It was.

[fol. 18] Q. Do your books show the distribution of that real estate value as a dividend?

A. They do, yes, sir.

Q. The amount was carried to undivided profits on the books of the Osage Mercantile Company the same as other dividends?

A. Yes, sir.

Q. And credited to the real estate account?

A. Yes, sir.

Q. I hand you this book, General Ledger No. 4, and ask you to state if that at page 285 shows the undivided profits account of the Osage Mercantile Company?

A. It does.

Q. And under the section headed 1913, what does it show there?

A. It shows on March 4th a cash dividend of $3,000, April first a cash dividend of $3,000; on May the 8th a cash dividend of $18,000 and on May 13, a charge to real estate of $25,150.

Q. What makes up that charge on May 8th of $18,000?

A. It was made up of $3,000 cash dividend to which I have before referred and the $15,000 considered as real estate that was transferred to the Mercantile Real Estate Company.

Q. Then those dividends you have read from this account show a distribution of $9,000 cash and $40,150 real estate up to May 13th of that year?

A. Yes, sir.

Q. The revenue agent's report to which I referred contains computations on the cash dividends, showing the amount of each dividend that was paid out of current earnings and the amount that was paid out of earnings or surplus on hand at March first 1913 does it not?

A. Yes, sir.

Q. The report shows as distribution from surplus earned prior to March first, 1913 including cash and real estate both the total sum of $45,946.53. Is that correct as shown by your books at that time?

A. The dividends as mentioned are correct. The $9,000 and $40,150 real estate.

Q. Then the amount of cash distributed from current earnings and the amount from earnings prior to March 1st, 1913 are a matter of computation here aren't they?

A. They are, yes, sir.

Q. Does it appear here how the agent arrived at the amount of current earnings?

A. Yes, sir. I think he took the amount earned for the year and divided it by 365 and arrived at the earnings per day, $48.41 per day.

Q. That was current earnings per day?

A. That was his computation.

Q. In the first dividend he determined the amount of current earnings distributed by taking the daily earnings [fol. 19] from March first 1913 to the date of that dividend and applying it on the dividend?

A. Yes, sir.

Q. And the remainder he took from the cash on hand at March first, 1913?

A. Yes, sir.

Q. And the next dividend he took the daily earnings from the date of the first dividend and the second dividend and treated it in the same manner?

A. Yes, sir.

Q. And so on in the third dividend?

A. Yes, sir.

Q. And if the method is correct the agent's figures as to distribution from surplus earned prior to March first, 1913 in money and real estate of $45,946.53 is correct is not?

A. It is correct if that theory is sound.

By The Court: What report were you reading from?

Mr. Garnett: The Revenue Agent's report.

By The Court: Where did you get it?

Mr. Garnett: The witness stated it was a carbon copy of the original report.

By The Court: Who did you make your report to?

Mr. Garnett: He made it to the Commissioner of Internal Revenue.

Mr. Toomey: This additional tax was predicated in the first instance upon an investigation made by the field agent out of Oklahoma City. In fact, the principal features of that report are agreed upon here in order to get into the record the legal question involved.

Mr. Garnett: This evidence is just for a matter of record largely. I don't think there is any controversy over any of it at this moment. This report which I referred to is one transmitted by G. C. Holding, internal revenue agent in charge under date of July 17th, 1922 to the Commissioner of Internal Revenue, and the copy I have in my hand is a carbon copy furnished the taxpayer by the agent at the time he concluded his examination.

By Mr. Garnett:

Q. Now in this agent's report, Schedule 1-B, is set up the assets of the corporation at the date of liquidation in the sum of $133,391.68. Is that amount correct as shown by the books of your company at that time?

A. I think it is, substantially so.

Q. What was the date of liquidation Mr. Tucker?

[fol. 20] A. July 20th, 1920.

Q. Did the corporation continue in business from March, 1913 until the date you have mentioned July 20th, 1920?

A. Yes, sir.

Q. Was it of the same nature that had been engaged in before?

A. Yes, sir.

Q. What was that?

A. Selling general merchandise at retail.

Q. At the same location?

A. The same location, yes, sir.

Q. That was on one of the main streets in the City of Pawhuska in this state?

A. Yes, sir.

Q. Did the corporation make annual return of its income for taxation from 1913 to 1920 inclusive?

A. Yes, sir.

Q. Had it made return prior to that date?

A. Yes, sir.

Q. When did you begin making returns?

A. When the law was enacted.

Q. Did you make returns under the 1909 law?

A. Well, it was in 1909 or 1910; back there somewhere.

Q. That is the old corporation excise law?

A. Yes, sir.

Q. Did you personally make return of your income?

A. Yes, sir.

Q. For 1913 and every year since?

A. Yes, sir; and the later years with the help of accountants.

Q. The first years you would make it yourself?

A. Yes, sir.

Q. In later years you have had to have expert help. Now Mr. Tucker, were there outstanding tax liabilities of the corporation at the date of liquidation in July, 1910?

A. Yes, sir.

Q. Assumed and paid by the stockholders?

A. Yes, sir.

Q. Do you have the total of that amount?

A. Yes, sir, I have.

Q. How much was it?

A. $37,565.89.

Q. What makes up that total, what items?

A. The amounts due for Federal income taxes, capital stock tax for 1920 and 1920 ad valorem taxes to the county.

Q. The advalorem taxes were local county and state Taxes?

A. Yes, sir.

Q. The other taxes were all Federal taxes?

A. There were $34,925.20 Federal Taxes.

[fol. 21] Q. Were part of those additional assessments on the corporation for prior years?

A. Yes, sir.

Q. Those assessment were made after investigation or examination by an agent?

A. Yes, sir.

Q. Have you deducted those taxes from the book value as shown in the agent's return to see what the net realization was?

A. Yes, sir, I have.

Q. What is the net?

A. $95,825.79.

Q. That was the net assets realized by the stockholders on liquidation?

A. Yes, sir.

Q. Now who were the stockholders at that time Mr. Tucker?

A. At the time of liquidation?

Q. Yes, sir.

A. My brother and myself each owning one half the stock.

Q. Did your brother acquire any stock that year, the year of liquidation?

A. Yes, sir, he did.

Q. Whose stock did he get?

A. He bought the Hutchens stock and bought the stock of Mr. Mathews estate and Mr. Mathews having died, and he bought Mrs. Ferguson's stock, Mr. Ferguson having died a few years previous.

Q. And also four shares from you?

A. Four shares from me to equalize the stock.

Q. All that stock was acquired in 1920?

A. Yes, sir.

Q. These persons you have named were stockholders continuously from prior to 1913 until the year 1920?

A. Yes, sir.

Q. Mr. Tucker, would you say that the stock of the Osage Mercantile Company had a good will value in excess of its asset value based on its earning capacity and conditions as they existed at Pawhuska March first, 1913?

A. Yes, sir, I would.

Q. I believe you testified its earnings were in excess of fifty per cent a year on $30,000 of capital stock from its organization?

A. Yes, sir.

Q. What would you say would be the value of that good will per share?

A. That is a hard question, but I think it would be at least a hundred dollars a share.

[fol. 22] Q. At least a hundred dollars a share would be the good will value. What were business conditions at Pawhuska at that time?

A. Business conditions were good.

Q. Had the town of Pawhuska grown rapidly during the preceding periods since the corporation was organized?

A It had and in 1913 it was in very prosperous condition and in a growing condition. The oil development of Osage county was showing up and business prospects were good.

Q. Do you know what percentage of increase in population the city had from 1910 to 1920?

A. The Federal census report I think shows something like 230 per cent; something over that probably.

Q. Now about what had been the earnings of the corporation prior to liquidation in 1920 for a period of four or five years approximately?

A. Well, after income taxes were paid approximately around an average of $25,000.

Q. That much annual income?

A. Yes, sir, after these tax assessments were paid.

Q. That would be about 83⅓ per cent on $30,000 capital stock?

A. Yes, sir.

Q. Had the corporation at that time increased its surplus and had a larger capital invested in its business than it did in 1913?

A. Yes, sir, after the real estate was taken out.

Q Were conditions, business conditions normal during the years 1916, 1917, 1918 and 1919?

A. No, sir, beginning with 1916 they were abnormal—extra prosperous.

Q. That was during the war times?

A. War times.

Q. Then the earnings during that period you would say were abnormal earnings?

A. Yes, sir.

Q. In 1920 was the situation such you could reasonably expect to continue the same rate of earnings?

A. They were not.

Q. Would you say that the stock had a good will value at the time of liquidation in 1920?

A. Would I say it had?

Q. Yes, sir.

A. I think it had.

Q. Was that any larger or any less than it had in March first, 1913?

A. I don't think it was as good in 1920 as it was in 1913. [fol. 23] Q. You think the good will value was probably less?

A. I think so.

Q. Could you give an opinion as to how much less in dollars?

A. It would be hard to say in dollars, but I know it wasn't as good.

Q. At least if there was a good will value of $100 in 1913 there was no greater good will value in 1920?

A. No, sir. I know there was no greater. May I give some reasons there?

Q. Yes, sir.

A. Well, Mr. Mosier was a member of the Osage tribe and influential and he was out of our organization. Mr. Mathews was likewise an Osage and he was dead. Mr. Ferguson, who was with us in 1913, was an old time trader, had known the Indians since the days of the buffalo hunt, and he was dead. Competition had increased wonderfully and it was a question of the survival of the fittest which did not apply in 1913.

Q. The business competition was keener?

A. Much more so. Prosperity of the town had brought it all in there.

Q. Now what was done with the assets of the corporation in 1920 when it liquidated?

A. My brother and I took the merchandise and the accounts over and set it up on the books, a new set of books as a partnership.

Q. Under what name did you operate?

A. We operated under the name of Osage Mercantile Company as a co-partnership.

Q. That is the same name as the corporation which had been liquidated?

A. Yes, sir.

Q. Did you continue the same kind of business?

A. Yes, sir.

Q. Did you use the same building and location?

A. Yes, sir.

Q. Did the corporation own this building on March first 1913?

A. It did.

Q. The Osage Mercantile Company?

A. The Osage Mercantile Company, yes, sir.

Q. Did the corporation own it at the time of liquidation?

A. It did not.

Q. It had been included in this distribution of real estate in 1913?

A. In 1913 is right.

[fol. 24] Q. And your partnership in 1920 has been conducting that business in a rented building?

A. We rented from the Mercantile Real Estate Company.

Q. You stated the value of these assets based on the figures given in the agent's report that you say are correct from the books after deducting the taxes outstanding, $95,825.78 as the value of the assets distributed. How much was that per share? $319.42 counsel says. Now referring to the March first value before liquidation, the figures you gave on that were $356.86 a share.

A. I have it in round numbers $357. $356. what?

Q. $356.86.

A. I presume that is right. That is on the agent's figures, not taking into consideration the actual value of the real estate.

Q. Not taking into account the appreciated value of the real estate. Those figures then show a higher value on March first than was realized on liquidation in July 1920 of about $37.00 per share does it not?

A. I think that is correct; something like $37.00.

Q. $37.86 less per share at liquidation than March first value.

Cross-examination.

By Mr. Toomey:

Q. Have you the minute books here in court?

A. Yes, sir.

Q. Where did you do your banking up at Pawhuska along about the time of this real estate deal? I mean along about May 8th or May 13th, 1913?

A. Probably the First National Bank and if the Citizens National Bank was in existence we may have been doing some with them.

Q. When did you first decide to form this real estate company?

A. Well, we talked of it about the time we found out the information on the Oklahoma law.

Q. When was that?

A. I don't know when that was; along about that time.

Q. Well, how long before?

A. Oh, considerably before.

Q. Before March first?

A. Yes, sir.

Q. How was this real estate transferred? How was the transaction?

A. Well, the transaction was simply that the real estate was deeded to the Mercantile Real Estate Company and the [fol. 25] stock of the Mercantile Real Estate Company was issued to the stockholders.

Q. Were you the president of that company at that time?

A. Yes, sir.

Q. Isn't it a fact you went over to the bank, you and the other stockholders and borrowed some money about that time in connection with that transaction?

A. If we did I don't remember it.

Q. Didn't you go to the bank and borrow $15,000?

A. I don't remember it if I did.

Q. Would your books show it if you did?

A. I think they will, yes, sir.

Q. When you formed this corporation you subscribed to stock in the new corporation didn't you?

A. Yes, sir.

Q. What did you pay for that stock with?

A. We paid the real estate.

Q. You don't recall then borrowing money from the bank at that time?

A. No, sir.

Q. And paying it into this new real estate corporation for stock?

A. No, sir, I don't.

Q. And then transferring the real estate to the new corporation in exchange for that $15,000?

A. No, sir I do not.

Q. You didn't do that at all?

A. I won't say I didn't do it.

Q. Then the $15,000 was distributed to the stockholders of the Osage Mercantile Company. Isn't that what the transaction was and then you went over to the bank and took up the note with the $15,000?

A. If that is a fact I don't remember it. All I know is the transaction there on the books. The sum and substance of it all was we took the real estate and put it in the other company, and took the stock of the other company for the real-estate.

Q. What was there on the books of the old company to show for that?

A. Just as I have testified to here.

Q. Taking it at the other end. At the time of liquidation the business was continued as a partnership?

A. Yes, sir.

Q. Under the same name, the Osage Mercantile Corporation?

A. Yes, sir.

[fol. 26] Q. Did you advertise to the public the fact that there was going to be a change?

A. We advertised that there was a change.

Q. How?

A. We advertised it had been changed.

Q. To what extent?

A. Publicity in the newspapers.

Q. What kind of publicity did you give to that fact?

A. Well, I think in our advertisements we made it a point and in our stationery and letter heads we made it a point to say it was Osage Mercantile Company, a co-partnership. Our letter heads are all marked that way.

Q. You were speaking of good will. What do you mean by good will Mr. Tucker?

A. Well, the attitude of the buying public towards an institution.

Q. When you say that good will increases the value of stock one hundred dollars per share what do you mean by that?

A. I mean the fact that we were there and a going concern and had been for years; members of the Osage tribe, influential members of the Osage tribe as members of the corporation and giving it their co-operation and the prestige we had from the fact they were there gave us that good will.

Q. Why do you say it is a hundred dollars a share instead of $500 a share?

A. If I was buying it I wouldn't give more than that.

Q. How would you measure it?

A. My own judgment and knowledge of conditions.

Q. In 1920 you had been there longer hadn't you?

A. Yes, sir.

Q. Oil had developed all around there?

A. Yes, sir.

Q. You were making larger earnings in 1920 than you were in 1913 weren't you?

A. We were on capital stock but not on capital invested.

Q. Your earnings for 1919 were over $34,000, weren't they?

A. Please take off the Federal liability. We paid $16,125.35 Federal income tax that year; that is, on that year.

Q. That is 1919?

A. Yes, sir.

Q. 1918 your net income was about $42,000.

A. Our income tax for that year was $30,097.23.

Q. What was it for 1917?

A. $15,292.45.

Q. That was your income tax?

A. Yes, sir.

[fol. 27] Q. Your net earnings for that year were over $51,000?

A. For 1917?

Q. Yes.

A. Are you sure you are looking at 1917?

Q. Yes, sir. Now didn't these earnings include or exclude rather, the deductions after income taxes had been

paid? This earnings for 1919 of $30,264.00. Isn't that net after taking out the income tax?

A. It is net after taking out $9,981.70 which we paid on the 1917 tax.

Q. Taking out how much?

A. You are talking about 1917?

Q. No, I am talking about 1919. Isn't that $34,000 net after taking out your income tax?

A. It is after taking out the income taxes of previous years.

Q. So you would make or were making that year over a hundred percent on your investment.

A. I beg your pardon * * *

Q. Generally speaking the same conditions relative to good will, that is, your position in the community, the benefit of being established for a long time would make your good will in 1920 better than it was in 1913 wouldn't it?

A. I beg to differ. I think it was less for the reasons I stated before.

Q. What were your reasons?

A. Well, Mr. Mathews was out of the organization. Mathews was dead. Ferguson was dead. Competition had increased to a point where it made things very strenuous. Altogether different from what it was in 1913.

Q. When was the biggest oil development around Pawhuska, up in the Osage Country?

A. It was probably from 1916 up to 1920.

Q. That is when there was the greatest development around there?

A. During that period.

Q. The outlook in 1919 and 1920 was that production was going to increase * * *

A. Business conditions in 1920, if you remember, were bad.

Q. I mean as to oil development.

A. Oil development had a black eye. Oil had been three dollars and a half and had gone down to a dollar and a quarter.

Q. As to the development and production of oil it was prospective wasn't it?

A. Yes, sir.

[fol. 28] Q. And as the oil production increased there your profits were greater weren't they?

A. No, sir.

Q. In dealing with those Indians as the Indians became wealthy from oil production your business flourished accordingly didn't it?

A. As the Indians became wealthy from their oil royalties and bonuses they spread to the four winds of the [campus] and so did the trade.

Q. But there were a good many of them up there?

A. Some of them are there yet?

Q. You spoke about the sale of four shares of this to your brother. What was that?

A. I sold him four shares.

Q. How much a share?

A. $450.00.

Q. When was that?

A. It was in July 1920 I think; about that time.

Q. July 1920.

A. Sometime previous to the liquidation; a short time before.

Q. What was the par value of that stock?

A. $100.00.

Q. You bought out Mosier's stock along in 1913 didn't you?

A. January 30th, 1914.

Q. How much per share?

A. We paid him $200 in money and made an agreement with him that went on down through the years for a certain discount on his purchases.

Q. You stated that the net earnings from 1902 to 1913 were about fifty per cent on your investment?

A. I think approximately, yes, sir.

Q. Is that a correct statement of the earnings of the company for those previous years?

A. I included the appreciated value on the real estate in my estimate.

Q. What does this represent?

A. This represents the book earnings I think.

Q. This represents the actual earnings of the company as taken from the books?

A. Outside of the appreciation of the real estate, yes, sir.

Q. And this for only five years shows net earnings, average yearly earnings of 40.95 per cent. That is what is shown by the books?

A. Well, take the appreciated on the real estate and it shows more.

Q. How did it come you sold your brother stock at $400 a share when you say it was worth less then than it was in 1913.

[fol. 29] Mr. Garnett: He didn't say that. Objected to for the reason he never said it was worth less. He testified as to the value on liquidation as shown by the agent's report and that the good will value was not any larger.

The Court: Let him answer.

Mr. Toomey: He testified the value of this stock in 1920 was $319.40. That is all except we want to see those minute books.

Redirect examination.

By Mr. Garnett:

A. I haven't answered that question yet.

Mr. Garnett: Go ahead.

A. I beg to differ with you on your statement of my fixing that value. I sold my brother the stock, those four shares that I had in excess of half the stock in order that he might own half the company.

By Mr. Toomey:

Q. You put a value of $450 on that didn't you?

A. Yes, but if he hadn't been my brother he wouldn't have got it.

Redirect examination.

By Mr. Barnett:

Q. Mr. Tucker, before dissolving the Osage Mercantile Company you had to advertise and public- notice of that fact in a paper in your home county did you not?

A. I can't say we did it before dissolving.

Q. Well, as a matter of law.

A. But as a matter of law we had to give notice and had to go through some proceedings to dissolve and had to go

through some publication in order to get the partnership going. It was all a matter of public record.

Q. The notice by publication was given as required by law for the dissolution of the corporation by court decree?

A. I remember it ran quite awhile.

Q. You also gave notice as required by law for a partnership under a name not indicating the members of the firm didn't you?

A. I think we indicated the members of the firm too.

Q. In your advertisement?

A. Yes, sir.

Q. But the law requires advertisement where the name of a partnership does not contain the names of the members of it, and you complied with that law?

A. Yes, sir.

[fol. 30] Q. Counsel asked you as to the basis for good will. Primarily earning capacity is what it is based on is it not?

A. I think so.

Q. In reference to the earnings prior to 1913; those years, 1910, 1911 and 1912 were a period of hard times in Oklahoma weren't they?

A. As shown by the books they were lean years.

Q. That was a period of business depression all over the country?

A. Yes, sir.

Q. The years just prior to 1920 were years of abnormal business prosperity?

A. Yes, sir.

Q. So that in 1913 you had passed the lean years and were starting on prosperity. In 1920 you had passed the prosperous years and were facing a decline?

A. That is the way it looked.

Q. Have you the total figures of the total taxes paid by this corporation for 1917, 1918, 1919 and 1920?

A. Yes, sir.

Q. Will you give those?

A. You mean Federal income taxes?

Q. Yes, sir.

A. 1917, $15,292.45; 1918, $30,097.23; 1919, $16,125.35; 1920, $8,603.81.

Q. That is all.

(Witness excused.)

A. N. RUBLE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. State your name.
A. A. N. Ruble.
Q. Where do you live?
A. Pawhuska, Oklahoma.
Q. How long have you lived there?
A. Twenty-three years.
Q. What is your business?
A. Banking.
Q. What bank are you connected with?
A. The First National Bank.
Q. Do you know the Osage Mercantile Company?
A. Yes, sir.
Q. You were there when it was organized and started in business?
A. Yes, sir.
Q. Do you know the nature of its business down to March first, 1913?
A. In a general way, yes, sir.
[fol. 31] Q. Were you acquainted with business conditions existing at that time, and the prospect for business at that time?
A. Yes, sir.
Q. Mr. Ruble, if a corporation had earned fifty per cent annually on a capitalization of $30,000 up to that date, and had on hand assets including certain real estate, including the property in which it was transacting business, would you say its stock had a good will value based on earning capacity in excess of the estate value?

Mr. Toomey: Objected to. I don't think the witness has shown himself qualified to answer any such question as that.
The Court: I think you should qualify him.

Q. What business have you been engaged in during the time you have lived in Pawhuska?
A. Banking business.

Q. In the banking business are you called upon to pass on the value of securities in one form and another?

A. I am.

Q. The values of properties?

A. Very frequently.

Q. Are you required to pass on the value of property based on the earning capacity.

A. Yes, take it in all its different phases.

Q. That is one element of value?

A. Yes.

Q. Are you aware of the real estate this concern owned on March first, 1913?

A. Yes, sir.

Q. Are you qualified to say what would be the good will, if any, on the stock of this corporation at that time?

Mr. Toomey: Objected to as he has not qualified as a real estate man, nor has he qualified as a man familiar with the mercantile business, and it is far fetched to ask a banker any such question as that.

The Court: He is not asking the ultimate question. He is trying to lay the predicate.

Mr. Toomey: Calls for a conclusion also.

The Court: Go ahead.

A. I don't think I could fix an exact figure but I could approximate it, based on transactions of this nature; considering them.

Q. Were you famil-ar with real estate values in Pawhuska at that time?

A. Yes, sir.

Q. Is it a necessary part of your business to know real estate values?

A. Yes, sir.

[fol. 32] Q. Now Mr. Ruble, this corporation having earnings in excess of 50 per cent annually on $30,000 of capital stock from 1902 to 1913 and owning the real estate with which you are familiar and the conditions existing in Pawhuska at that time as a growing city and the outlook for future business, what would you say would be approximately the good will value on the stock of the Osage Mercantile Company at that time?

A. I think it would be from a dollar to a dollar and a half.

Q. You mean from $100 to $150 a share?

A. Yes, sir, on the basis of a hundred dollar certificate.

Q. On a dollar of stock it would be from one dollar to a dollar and a half?

A. Yes, sir.

Q. Were you equally familiar with its good will value in July 1920 when it liquidated?

A. I think I was.

Q. What would you say as to its good will value then?

A. I wouldn't alter the figures very much; approximately the same.

Cross-examination.

By Mr. Toomey:

Q. It is highly speculative isn't it?

A. No, not hardly so. Of course, there is speculation in all these matters.

Q. Doesn't the personal element enter into that a good deal, depending a good deal upon the men who are running that store?

A. Well, I think that would be an asset.

Q. Don't you think it would be one of the biggest assets in a business of that kind?

A. Surely, the management has a great deal to do with those things, the location and value of the property and all those things enter into it.

Q. Suppose Tucker had been taken out of that business would that have substantially affected the good will?

A. I couldn't say, because he might be replaced by a better man or a worse one.

Q. You think it would depend a good deal in the standing in the community of the men who took their places?

A. Yes, sir, it would.

Q. Your conclusion in the matter is simply that the good will value was approximately the same in 1920 as it was in 1913?

A. Yes. I don't think it was materially different.

Q. Don't you think the oil development up there would increase the outlook at that time?

A. I don't know that I get your question.

Q. There was a big oil development along in 1920 and prior years wasn't there?

A. Yes, sir.

[fol. 33] Q. Wouldn't that increase the outlook and earnings of an old established concern there?

A. Well, I don't think it did because other towns grew up and the competition was scattered, and the Indians left there and went other places. As they got more money they moved to California and Wichita and various other places. I don't think it very materially increased the business.

Q. How about the banking business?

A. The banking business increased materially.

Q. How about the other lines of business there, real estate?

A. Real estate is pretty good, pretty good business, in 1920.

Q. How about professional lines, didn't they increase?

A. Yes, sir.

Q. Everything save the mercantile business?

A. No, I didn't make that statement. I said it was more scattered.

Q. You were acquainted with the Tuckers along in 1920 weren't you?

A. I was.

Q. Would you say their changing from a corporation to a partnership under the same name would cause them any loss on account of good will?

A. No, I think not.

H. J. SMITH was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. State your name.

A. H. J. Smith.

Q. Where do you live?

A. Pawhuska.

Q. How long have you lived there?

A. Sixteen years.

Q. How long had you lived there prior to March first, 1913?

A. 1906, or 1909; three years.

Q. What has been your business?

A. Farm loans and real estate.

Q. Are you acquainted with Mr. Tucker and his brother?

A. Yes, sir.

Q. R. W. Tucker?

A. Yes, sir.

Q. Are you acquainted with the stockholders and owners of the Osage Mercantile Company along in 1913?

A. Yes, sir.

Q. Were you acquainted with the business?

A. Yes, sir.

Q. Engaged in the mercantile business are they?

[fol. 34] A. Yes, sir.

Q. Were you acquainted with the real estate that they owned at that time?

A. Yes, sir.

Q. Did you know real estate values there at that time?

A. Yes, sir.

Q. Are you acquainted with the business conditions existing there at this time?

A. Yes, sir.

Q. Do you write insurance in connection with your loan business?

A. Yes, sir.

Q. In your loan business do you have occasion to determine the value of securities or property in which earning capacity is an element of value?

A. Yes, sir.

Q. And would you say you could state what would be the good will value on the stock of the Osage Mercantile Company at March first, 1913 if you were acquainted with its earnings for the previous period?

A. Yes, sir.

Q. Assuming that the stock had earned in excess of fifty per cent on $30,000, capital for a period from 1902 when it was organized until March first, 1913, and with the real

estate it owned and business it had and business conditions, as they were known to you at the time, what would you say would be its good will value?

A. A dollar and a half.

Q. That is a dollar and a half good will value above par value of stock?

A. Yes, sir.

Q. If the par value of the stock is a hundred dollars a share that would be $150.00.

A. Yes, sir.

Q. Were you equally acquainted with the facts and circumstances surrounding it and its good will value in 1920?

A. Yes, sir.

Q. What would you say as to its good will value then?

A. A dollar and a half.

(Witness excused.)

R. W. TUCKER was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. State your name.

A. R. W. Tucker.

Q. Where do you live?

A. Pawhuska.

Q. What is your business?

A. Mercantile.

Q. You are a brother of the plaintiff, W. C. Tucker?

A. Yes, sir.

Q. Were you in the Osage Mercantile Company when it was organized?

A. Shortly afterwards.

[fol. 35] Q. And been a stockholder in it until its liquidation?

A. Yes. sir

Q. Were you familiar with its property and business and earnings up to March first, 1913?

A. Yes, sir, I think so.

Q. Are you able to say what the good will value, of the stock, was at that time?

A. Well, I would say from $150.00 to $200.00 a share.

Q. You can say whether you know what its good will value was approximately?

A. Yes.

Q. It had earned something in excess of fifty percent on $30,000 up to that time had it not?

A. I think so.

Q. Now it would be $100 to $150 a share. You were still a stockholder in 1920 when it was liquidated?

A. Yes, sir.

Q. What would you say as to its good will value at that time?

A. Well, in my estimation there wouldn't be much difference; be about the same.

Q. Had about as much good will value then as it did in 1913?

A. I think so.

Q. You were a stockholder who received liquidating dividends?

A. Yes, sir.

Q. Or assets in liquidation?

A. Yes, sir.

Q. And formed a partnership with the plaintiff under the name of Osage Mercantile Company?

A. Yes, sir.

Q. Still engaged in that business?

A. Yes, sir.

Q. Were you a stockholder in the Mercantile Real Estate Company?

A. Yes, sir.

Q. And still a stockholder in it?

A. Yes, sir.

Q. Does that company still own the real estate it received in 1913 by deed of conveyance from the Osage Mercantile Company?

A. Well, I think we own it all yet. We may have disposed of one piece, I don't know, but the majority of it we still own, yes, sir.

Q. Mr. Tucker, do you know how the real estate distribution in 1913, May 13th of that year was made to the Mercantile Real Estate Company?

A. Know how it was made you say?

Q. Yes.

A. Well, the Mercantile Real Estate Company was organized, and the stock was issued according to their holdings in the Osage Mercantile Company, the same amount or pro rata in proportion to their holdings. Is that what you mean?

[fol. 36] Q. Yes, sir. Then the real estate was deeded to the Mercantile Real Estate Company?

A. Yes, sir.

Q. The stock in it was issued to the stockholders of the Osage Mercantile Company in the same proportion?

A. The same proportion.

Q. As held in the Osage?

A. Yes, sir.

Q. Was that done by setting it up as a dividend on the books of the corporation?

A. Yes, sir.

Q. Was there any cash figured in that transaction?

A. Yes, sir.

Q. How was that?

A. The stockholders turned in their checks to the Osage Mercantile Company and they were afterwards paid out in dividends as I remember it.

Q. The transaction was had by exchanging checks?

A. Yes, sir.

Q. There was no consideration of value passed either way but just an exchange of checks as you say?

A. That is as I remember it.

Q. To what company did the stockholders give their checks?

A. The Mercantile Real Estate Company.

Q. Did the Mercantile Real Estate Company give its check to the Osage Mercantile Company, or do you know?

A. I am not clear on it. I don't remember.

Q. Then the Osage Mercantile Company gave its checks to its stockholders?

A. Yes, sir.

Q. For the same amount that went to the Mercantile Real Estate Company?

A. Yes, sir.

Q. Mr. Tucker, was that transaction handled in this way; the checks of the Osage Mercantile Company were issued to its stockholders in declaration of a dividend and those checks were turned to the Mercantile Real Estate Company in payment of its stock?

A. That is what I was trying to say.

Q. And the Osage then deeded the real estate to the Mercantile?

A. Yes, sir.

Cross-examination.

By Mr. Toomey:

Q. How much money passed over to the Osage Mercantile Company as a result of this transaction?

A. I wouldn't say.

Q. $15,000 wasn't it?

A. $15,000.

Q. The consideration for this real estate transfer was $25,000, altogether. Isn't that correct?

A. I don't remember. The books show.

[fol. 37] Q. $15,000 cash and assumed a $10,000 mortgage.

A. That is it, yes sir.

Q. You borrowed some money about that time didn't you?

A. We did not.

Q. The stockholders as individuals didn't do that?

A. No, sir.

Q. Why all this passing of checks back and forth around among the individuals to get this transferred from the Osage?

A. There was no checks among individuals. Checks into the company.

Q. Tell us in your own words what took place.

A. I can't do it. I don't remember.

Q. You don't remember whether this statement made by Mr. Garnett is correct or not?

A. Yes, sir, I think it was.

Q. What was that, what took place?

A. As I remember it the stockholders in the Mercantile Real Estate Company paid their checks in for the $15,000.

Q. Paid their checks to who?

A. To the Osage Mercantile Company for the real estate.

Q. Did you subscribe for any stock in the real estate Company?

A. Yes, sir.

Q. How much did you subscribe to?

A. Whatever my share was there.

Q. The same as you had in the other company?

A. Yes, sir.

Q. Did you pay the real estate company for that stock?

A. I did.

Q. How did you pay it?

A. Check.

Q. What did the real estate company do with that check?

A. They paid it to the Osage Mercantile Company.

Q. Then the Osage Mercantile Company paid that money back to you in the form of a check, is that right?

A. In the form of a dividend, yes, sir.

Q. Did you ever consider the matter of good will value—when did you first think of the good will value of that stock in dollars and cents?

A. Well, I don't know that.

Q. Just recently, before this trial?

A. Well, if a man has got something he wants to sell he sometimes thinks about what it is worth.

Q. Did you have occasion to consider the good will value of this stock back in 1913?

A. I probably would have if I had a purchaser.

Q. You didn't set it up on the books?

[fol. 38] A. No, you don't set good will up on the books.

(Witness excused.)

G. W. Hutchins was thereupon called as a witness by the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. What is your name?

A. G. W. Hutchins.

Q. Where do you live?

A. Neosho, Missouri.

Q. Did you live in Pawhuska prior to going to Missouri?

A. Yes, sir.

Q. How long did you live there?

A. About twenty-five years.

Q. Were you there in 1902 when this corporation, the Osage Mercantile Company was organized?

A. Yes, sir.

Q. Were you one of the original incorporators and stockholders?

A. Well, shortly afterward, yes, sir.

Q. You got in immediately after it was organized?

A. Yes, sir.

Q. Did you own your stock down until the year 1920?

A. Yes, sir.

Q. Were you a stockholder throughout the year 1913?

A. Yes, sir.

Q. Were you an incorporator and stockholder of the Mercantile Real Estate Company?

A. Yes, sir.

Q. That is the corporation that received the real estate owned by the Osage Mercantile Company by deed of conveyance in 1913?

A. Yes, sir.

Q. Can you tell the court the manner in which that transaction of the distribution of the real estate or conveyance of it was handled?

A. I don't know whether I can or not. I know the company was formed and they issued stock. There was a stock dividend as I understood it. I paid no attention to it much, no more than just declared a stock dividend as I think.

Q. A stock dividend in what company?

A. From the Mercantile to the Osage Realty Company.

Q. Then what was done with your stock?

A. We each one got our stock.

[fol. 39] Q. Distributed to the stockholders?

A. Yes, sir.

Q. Did you pay out any money at all in that transaction?

A. No, sir. I don't remember whether there was checks issued from the Mercantile Company to us for the real estate transfer or not. I don't know. I don't remember.

Q. Whether there were checks passed or not the net result was that without paying out any money you got stock?

A. I just took it as a dividend from the Mercantile company to the real estate company.

Q. You got stock in the Mercantile Real Estate Company in the same proportion you held stock in the Osage?

A. Yes, sir.

Q. And the real estate passed from the Osage to the Mercantile Company?

A. Yes, sir.

Q. Whether checks were exchanged back and forth you don't remember at this time?

A. I don't remember, if they were. There might have been and might not. I don't remember. Very likely there were.

Q. But you were not out any money in that transaction?

A. Not a nickle, any more than checks were issued—they might have been. I got several dividends, I don't remember; never paid much attention.

Q. Does the Mercantile Real Estate Company still own the real estate it got in that transaction?

A. Yes, sir.

Q. You are still a stockholder in them?

A. Yes, sir.

(Witness excused.)

W. E. McGuire was thereupon called as a witness on behalf of the plaintiff and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Garnett:

Q. State your name.

A. W. E. McGuire.

Q. Where do you live?

A. Pawhuska.

Q. How long have you lived there?

[fol. 40] A. Thirty years this last time; came there forty years ago and been there thirty years this last trip.

Q. What is your business?

A. At present it is real estate and loans and insurance.

Q. Have you been engaged in that business all the time during your last thirty years there?

A. No, sir. I was postmaster eighteen years and have been in the real estate, loan insurance business since 1916.

Q. You were there at the time of the organization of the Osage Mercantile Company?

A. Yes, sir.

Q. Were you acquainted with the real estate it owned on March first, 1913?

A. Yes, sir.

Q. Were you at that time familiar with the values of real estate in Pawhuska?

A. Yes, sir.

Q. Were you familiar with business conditions existing there at that time?

A. Pretty well, yes, sir, not as well as later. I guess I was in business. I owned a business outside of the postmaster job. I had another job.

Q. Assuming that the earnings of this company from its organization in 1902 with a capitalization of $15,000 had amounted to more than 50 per cent on a capital stock of $30,000 up to March first, 1913, could you with your knowledge of its property and business and business conditions say whether or not it had a good will value?

A. Yes, since I have investigated and found out what is supposed to be meant by good will value I should say that I could approximate the good will.

Q. What would you say would be the good will value of the stock in this corporation at that time under the conditions I have named?

A. Well, I would think about as given by the witnesses before me, from a dollar to a dollar and a half. Of course, it is approximate, any valuation we give is an approximation, as an approximate value, but it is my judgment, knowing the men and knowing the conditions that it would amount to from one dollar to a dollar and a half.

Q. Now were you equally familiar with the good will value in July 1920?

A. Yes, sir.

Q. What would you say as to its good will value then?

A. I wouldn't think it would be hardly so good.

Q. Why?

A. As has been stated before the members of the firm who passed out of the firm were influential men; two of [fol. 41] them were very influential among their people, the Osages, and I think that would make some difference. It seems to me it would be natural that it would.

Q. Was there any change in business conditions in 1920 as compared with 1913?

A. Conditions were not nearly so good for several years.

Q. That is, not so good in 1920?

A Not so good in 1920 as it had been—you mean back to 1913?

Q. Yes, sir.

A. Well, I don't—it might have been as good in 1920 as 1913, but in the intermediate years—the years between it had been very much better than in either of those years.

Q. That was during the war?

A. Yes.

Q. And business conditions were abnormally prosperous?

A. Yes, sir. They were abnormal in those years, of course.

Q. In 1920 it was getting back to normal?

A. Yes.

Cross-examination.

By Mr. Toomey:

Q. What do you mean by good will of the business?

A. As explained to me in trying to post myself in regard to this matter, I was informed it includes such items as the popularity of the firm and influence of the men connected with [*with*] the firm, the conditions of trade, the opportunity for influencing the trade and such things as that.

Q. Who gave you that information?

A. I got it from various persons to whom I had talked; part from the attorneys in the case, partly from other business men to whom I talked.

Q. You have never had any experience in valuing good will in connection with your business have you?

A I have heard it always in buying and selling that there was a good will influence went with it.

Q You are not a specialist in such matters?

A. No, sir.

Q. You are just an ordinary business man like all the rest of them?

A. Just an ordinary business man; very ordinary.

Q. You wouldn't consider your opinion on the matter of good will any more valuable than mine or my neighbor's would you if I were a business man at Pawhuska?

A. With the opportunity to know the conditions the same as I have known this I would say not.

[fol. 42] Q. Any of the old timers in Pawhuska would be just as qualified to talk about good will as you are?

A. I wouldn't say any of them. We have some there that can't speak English, and we have some Indians there who don't know very much about business, and some who know a good deal.

Redirect examination.

By Mr. Garnett:

Q. You understand that earning capacity enters into good will, and the established trade and custom, and the habit people have of going to a certain place to deal?

A. That is my understanding that is one of the items that enters into it.

(Witness excused.)

(Hereupon court recessed until nine o'clock A. M. June 13th, 1925, at which time all parties being present as heretofore, the trial of the above and foregoing cause was resumed, and further proceedings had as follows:)

W. C. Tucker was thereupon recalled as a witness and, having been previously sworn, further testified as follows:

Mr. Tooney: On yesterday during the cross-examination of this witness I asked two questions. One was with reference to the purchase of some shares of stock from Mr. Mosier I believe, in which it was answered it was $200 a share. I also asked another question with reference to the sale by Mr. Tucker to his brother of four shares at $450 a share. Those questions were asked with the idea of having some bearing on this good will question and not with the

idea of injecting into the case any question as to the value of this real estate. In order to simplify the issues I have concluded to withdraw my question, those questions from the record. I don't want to inject into this case any question of valuation. That will be agreed upon.

By the Court: Value of what?

Mr. Tooney: Value of the stock as of March first.

It will be agreed in this case that the valuation fixed by the Revenue Agent based upon the net worth is correct, and it isn't necessary to go into any increased value of that by showing the value of the real estate. That will be cleared up before the end of the trial and I think we will stipulate [fol. 43] these things definitely and eliminate that issue.

Mr. Garnett: In order that there may be no misunderstanding, I would like to say the revenue agent's figures are correct as to the asset value of the stock, but any question of good will that should enter into it will be determined upon the evidence. Before proceeding to examine the witness I wanted to ask leave of court to amend the petition. I should have done so yesterday, but hurried into this case, by changing the figures on line ten on page three from $356.86 to $203.71.

By the Court: You mean the valuation on the stock by the Commissioner?

Mr. Garnett: The figures in Line 8, yes, sir.

By the Court: I am asking you what the item is.

Mr. Garnett: It is alleged as valuation taken by the Commissioner on the stock. The figures in the petition are the assets value. I have reduced that by withdrawing the real estate and took a lower figure.

By the Court: You are talking about the valuation of March first, 1913 are you?

Mr. Garnett: Yes, sir.

By the Court: That is simply a mistake as to what the Commissioner did?

Mr. Garnett: Yes, sir. I understand counsel has no objection to that change.

Mr. Toomey: No objection to that amendment of the petition.

By the Court: You can make the amendment. It is a mistake of what valuation the Commissioner put on the stock at that date.

W. C. TUCKER, recalled, being previously sworn, further testified as follows:

Redirect examination.

By Mr. Garnett:

Q. You still own the stock in the Mercantile Real Estate Company which you received at the time that company was organized in 1913?

[fol. 44] A. Yes, sir.

Q. And does that company still own the real-estate which it received by conveyance from the Osage Mercantile Company at that time?

A. With the exception of one piece; probably two or three thousand dollars.

Q. There has been no change in your stock ownership in the Mercantile Real Estate Company, however?

A. Except the changes caused by the death of the original stockholders and the estates now hold it.

Q. But your individual stock?

A. No, sir, no change.

Q. No change in that?

A. No, sir.

Q Now referring to the Revenue Agent's report about which you were asked yesterday, and in Schedule B of that report, as testified yesterday, the agent deducted $45,946.53 from the March first asset value and then took the remainder as the asset value of that date. Is that correct?

A. Yes, sir.

Q. Now does that report show that after the deduction $61,113.38 was the asset value?

A. It does.

Q. And does that show for 300 shares of stock a value per share of $203.71?

A. The report shows that, yes, sir.

Q. And the division of this sum, net sum of surplus and capital prior to March first, 1913 by the 300 shares of stock outstanding produces this result of $203.71 which the agent used?

A. Yes, in his computation.

Q. Now using that as March first value, the cost of your stock, did the agent determine you a profit on the stock in liquidation?

A. He did.

EXHIBIT 1.

Page 1 of Return

Form 1040—UNITED STATES INTERNAL REVENUE SERVICE

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000, OR SEPARATE RETURNS OF HUSBAND AND WIFE IF COMBINED NET INCOME EXCEEDS $5000

FOR CALENDAR YEAR 1920

Or for period begun ....., 19.. ..., and ended ....., 19....

IF RETURN IS FOR CALENDAR YEAR 1920 FILE IT WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR DISTRICT ON OR BEFORE MARCH 15, 1921

IF FOR A PERIOD OTHER THAN A CALENDAR YEAR THE RETURN SHOULD BE FILED ON OR BEFORE THE 15TH DAY OF THE THIRD MONTH FOLLOWING THE CLOSE OF SUCH PERIOD

If the return is made for a period other than a calendar year, the dates of the beginning and ending of the period covered must be plainly stated in the space provided above.

PRINT PLAINLY NAME, STREET AND NUMBER, OR RURAL ROUTE, POST OFFICE, COUNTY, AND STATE

Mar 16 1921
Dist Oklahoma

W. C. Tucker

Pawhuska Oklahoma (303832)

CASH	
CHECK	
M. O.	
CERT. of IND.	

(DO NOT WRITE IN THIS SPACE)

Examined by 36th

Audited by

FIRST PAYMENT $1293.23

Cashier's Stamp

Collector of Internal Revenue
Paid Mar 16 1921
District Oklahoma

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith, for the taxable period as stated, pursuant to the Revenue Act of 1918 and the Regulations issued under authority thereof.

(If return is made by agent, the reason therefor must be stated on this line.)

Sworn to and subscribed before me this 14 day of March, 1921.

W. C. Tucker
(Signature of individual or agent.)

J. W. Nutt, Notary Public
(Signature of officer administering oath.) (Title.)

(Address of individual or agent.)

1. Are you a citizen of the United States? Yes
2. If not, are you a resident of the United States?
3. If neither, of what country are you a citizen or subject?
4. Did you file a return for 1919? Yes
5. If so, what address did you give on that return? Pawhuska, Okla
6. To what Collector's office was it sent? (Give district or city and State) Oklahoma, Okla
7. Did you receive any adjustments during the taxable period on account of Government contracts through the operations of a claims board or otherwise? No
8. Were you married and living with wife (or husband) on the last day of your taxable period? Yes
9. If not, were you on the last day of your taxable period supporting one or more persons living in your household who are closely related to you by blood, marriage, or adoption?
10. How many dependent persons under 18 (or if 18 or over, incapable of self support because mentally or physically defective) were receiving their chief support from you on the last day of your taxable period? 3
11. Was a separate return filed by your wife (or husband)? yes If so, state (a) exemption claimed $1000.00 (b) Name and address entered at head of that return Florence Tucker, Pawhuska Oklahoma
12. Write "R" if you kept no books, or books on a cash basis; or "A" if you kept books on an accrual basis R
13. Did you pay during the calendar year 1920 to any individual rent, wages, salaries, or other fixed or determinable income amounting to $1,000 or over? No (If so, secure from the Collector Forms 1096 and 1099 and file a return of information.)
14. Enter below all nontaxable income received by you during the taxable period from the following sources:

Class of Securities.	Principal.	Interest.	Class of Securities.	Principal.	Interest.	Source of Compensation.	Amount.
First Liberty Loan 3½% Bonds unconverted	$	$	Obligations of States and Territories, political subdivisions thereof, and the District of Columbia	$	$		$
Other obligations of the U. S. issued before Sept. 1, 1917, and obligations of U. S. possessions							
Victory Liberty Loan 3¾% Notes			Federal Farm Loan Bonds				

15. Enter in the table below income (whether received or not) from partnerships, personal service corporations, and fiduciaries.

1. Name and Address of Partnership, Personal Service Corporation, or Title of Estate or Trust, with Name and Address of Fiduciary.	2. Period (Enter 1920 or Date on which Fiscal Year Ended).	3. Interest on Tax-Free Covenant Bonds.	4. Dividends.	5. Interest on Liberty Bonds, etc., Issued Since Sept. 1, 1917, and War Finance Corporation Bonds.	6. Other Income.
W.C.Tucker, Pawhuska, Okla. GDn of Mohogle and Metsahike	1920	$	$	$	$ 800.00
Gdn of Rose Strike Axe	1920				600.00
Osage Mercantile Company	1920		24,608.86		
		Enter on F (b), page 2.	Enter on H (b), page 2. 24,608.86	Include in 16 (a), page 1.	Enter on C, page 2. 1400.00

OR OF INTERNAL REVENUE FOR YOUR DISTRICT.

(a) Totals (see page 2 of instructions, Schedule C) .....

16. Enter on line (a) in the table below **Interest on Liberty Bonds** and other obligations of the United States issued since September 1, 1917, and War Finance Corporation Bonds, received by you during the taxable period, including interest received through partnerships, personal service corporations, and fiduciaries. (See page 2 of instructions, Schedule I.)

Obligations	First Liberty Loan Converted 4% Bonds of 1932-47.	Second Liberty Loan 4% Bonds of 1927-42.	First Liberty Loan Converted 4½% Bonds of 1932-47.	Second Liberty Loan Converted 4½% Bonds of 1927-42.	Third Liberty Loan 4½% Bonds of 1928.	First Liberty Loan Second Converted 4½% Bonds of 1932-47.	Fourth Liberty Loan 4½% Bonds of 1933-38.	——% Other Obligations Issued Since Sept. 1, 1917.	Victory Liberty Loan 4½% Notes of 1922-23.	War Finance Corporation 5% Bonds of 1920.
Interest Dates	June 15. December 15.	May 15. November 15.	June 15. December 15.	May 15. November 15.	March 15. September 15.	June 15. December 15.	April 15. October 15.		June 15. December 15.	April 1. October 1.
(a) Amount of interest	$	$	$	$	$	$	$	$	$	$
(b) Average principal										
Exemptions.										
(c) $5,000									xxxxxx	xxxxxx
(d) 20,000								xxxxxx	xxxxxx	xxxxxx
(e) 30,000								xxxxxx	xxxxxx	xxxxxx
(f) 45,000						xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx
(g) 30,000	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx		xxxxxx	xxxxxx	xxxxxx	xxxxxx
(h) 30,000	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx		xxxxxx	xxxxxx	xxxxxx
(i) 5,000	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	xxxxxx	
(j) Principal in excess of exemptions										
(k) Taxable interest										

(l) Total taxable interest on all obligations as computed above on line (k) (enter as Item 19 below, and as Schedule I, page 2) ..... $

State the amount of the Victory Liberty Loan 3½% and 4½% Notes originally subscribed for and still owned at the date of filing this return ..... $

State the amount of the Fourth Liberty Loan 4½% Bonds originally subscribed for and still owned at the date of filing this return ..... $

COMPUTATION OF TAX.

17. Net income on which tax is to be computed (from Schedule N)		$ 46,467	74
18. Less: Dividends (from Schedule H)	$ 37,117 47		
19. Taxable interest on Liberty Bonds, etc. (from Item 16 (l) above)			
20. Personal exemption	1,600 00		
21. Total of Items 18, 19, and 20		38,717 47	
22. Balance subject to normal tax (Item 17 minus Item 21)		$ 7,750	27
23. Amount subject to normal tax at 4% (not over $4,000)		4,000	00
24. Balance subject to normal tax at 8% (Item 22 minus Item 23)		$ 3,750	00

25. Normal tax at 4% on amount of Item 23	$ 160	00
26. Normal tax at 8% on amount of Item 24	300	02
27. Surtax on Item 17 (see surtax table, page 1 of instructions)	4712	90
28. Total Tax	$	
29. Less: Tax paid at source $		
30. Income and profits taxes paid during taxable period to foreign countries or possessions of the United States (attach Form 1116)	$	
31. Balance of tax due (Item 28 minus Items 29 and 30)	5,172	92
32. Amount of tax paid on submission of return	$ 1,293	23

PREPARATION OF RETURN.

Did you employ anyone especially to prepare or advise in the preparation of this return? (Answer "Yes" or "No.") No If so, give name and address and state the extent to which you received such assistance or advice.....

AMENDED RETURNS.

An amended return must be plainly marked "Amended" across the face of the return.

CHECKS AND DRAFTS.

Checks and drafts will be accepted only if payable at par at your Collector's office.

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DETACH RETURN HERE AND SEND IT TO COLLECT

47-48

INDIVIDUAL RETURN OF TAXABLE INCOME

SCHEDULE A.—INCOME FROM BUSINESS OR PROFESSION.

1. Kind of business ..... 2. Business address .....

3. Total sales and income from business or professional services ..... $

COST OF GOODS SOLD:

4. Labor ..... $
5. Material and supplies .....
6. Merchandise bought for sale .....
7. Other costs (list principal items and amounts at foot of page or on separate sheet) .....
8. Plus inventory at beginning of year (see page 2 of instructions, Schedule A) .....
9. TOTAL ..... $
10. Less inventory at end of year .....
11. NET COST OF GOODS SOLD ..... $

State amount of salary to self included in Item 12 ..... $
State amount of obsolescence included in Item 16 ..... $

OTHER BUSINESS DEDUCTIONS:

12. Salaries and wages not reported as "Labor" under "Cost of goods sold" ..... $
13. Rent on business property in which taxpayer has no equity .....
14. Interest on business indebtedness to others .....
15. Taxes on business and business property .....
16. Repairs, wear and tear, obsolescence, depletion, and property losses (explain in table below) .....
17. Amortization of war facilities .....
18. Bad debts arising from sales or professional services .....
19. Other expenses (list principal items and amounts at foot of page or on separate sheet) .....
20. TOTAL (Items 12 to 19, inclusive) ..... $
21. NET COST, PLUS TOTAL DEDUCTIONS (Item 11 plus Item 20) ..... $
22. NET INCOME FROM BUSINESS OR PROFESSION (Item 3 minus Item 21) ..... $

SCHEDULE B.—INCOME FROM SALARIES, WAGES, COMMISSIONS, BONUSES, DIRECTOR'S FEES, AND PENSIONS.

1. By Whom Received. (Give name.)	2. Occupation.	3. Name and Address of Employer.	4. Amount Received.	5. Expenses (Explain Below).	
W. C. Tucker	Pres & Mgr	Osage Merc Co- Pawhuska Ok	$9600 00	$ -	
"	Pres	Mercantile Real Estate Co. "	300 00		
"	Director	Citizens Nat'l Bank " "	2500 00		
NET INCOME FROM SALARIES, ETC. (total of column 4 minus total of column 5)			$9925 00	$	$ 9925 00

SCHEDULE C.—INCOME FROM PARTNERSHIPS, PERSONAL SERVICE CORPORATIONS, AND FIDUCIARIES (From Item 15 (a) column 6, page 1) ..... $ 1400 00

SCHEDULE D.—PROFIT FROM SALE OF LAND, BUILDINGS, STOCKS, BONDS AND OTHER PROPERTY, AND FROM LIQUIDATING DIVIDENDS.

1. Kind of Property.	2. Name and Address of Purchaser or Broker.	3. Sale Price or Liquidating Dividends.	4. Date Acquired	5. Cost, or if Acquired Prior to March 1, 1913, the Fair Market Value on That Date.	6. Cost of Subsequent Improvements, if any.	7. Depreciation.	
		$		$	$	$	
NET PROFIT FROM SALES (total of columns 3 and 7 minus total of columns 5 and 6)		$		$	$	$	$

SCHEDULE E.—INCOME FROM RENTS AND ROYALTIES.

1. Kind of Property.	2. Name and Address of Tenant, Lessee, etc.	3. Amount Received.	4. Repairs, Wear and Tear, Obsolescence, Depletion and Property Losses	5. Interest.	6. Taxes.	7. Other Expenses (Explain Below).

NET INCOME FROM RENTS AND ROYALTIES (total of column 3 minus total of columns 4, 5, 6, and 7)																			

SCHEDULE F.—INTEREST ON CORPORATION BONDS CONTAINING TAX-FREE COVENANT, ON WHICH A TAX OF 2% WAS PAID AT SOURCE.
Received (*a*) directly, $_____; (*b*) through partnerships, personal service corporations, and fiduciaries (Item 15 (*a*), column 3), $_____ TOTAL $_____

SCHEDULE G.—OTHER INCOME (not including dividends, or interest on obligations of the United States).

	AMOUNT RECEIVED	
1. Interest on bonds, mortgages, and other obligations of domestic and resident corporations except as reported in Schedule F		
2. Interest on bonds of foreign countries and corporations, and dividends on stock of foreign corporations which are not taxable by the United States on their net incomes		
3. Interest on bank deposits, mortgages, etc		
4. Amount paid for you at source on tax-free covenant bonds		
5.		
TOTAL		

SCHEDULE H.—DIVIDENDS.
Received (*a*) directly, $12508.61; (*b*) through partnerships, personal service corporations, and fiduciaries (Item 15 (*a*), column 4), $24608.86 TOTAL $37117 47

SCHEDULE I.—TAXABLE INTEREST ON LIBERTY BONDS, OTHER OBLIGATIONS OF THE UNITED STATES, AND WAR FINANCE CORPORATION BONDS (from Item 16 (*l*), page 1) $_____

SCHEDULE J.—TOTAL NET INCOME FROM ABOVE SOURCES (Total net income less total deficits shown in above Schedules) $48442 47

SCHEDULE K.—DEDUCTIONS (except those included above and contributions).

1. Interest paid	$ 614 73	3. Losses by fire, storm, etc. (explain in table below)	$
2. Taxes paid		4. Bad debts (explain in space at foot of page)	1325 00
		5. Amounts paid to beneficiaries, etc	$
		TOTAL	$ 1939 73

SCHEDULE L.—NET INCOME (without deducting contributions) (J minus K) $46502 74

SCHEDULE M.—CONTRIBUTIONS (List below names and amounts paid to each corporation) $ 35 00

SCHEDULE N.—NET INCOME UPON WHICH TAX IS TO BE COMPUTED (L minus M) (Enter as Item 17, page 1) $46467 74

ENTER IN THIS TABLE DETAILS CONCERNING REPAIRS, WEAR AND TEAR, PROPERTY LOSSES, ETC., CLAIMED AS DEDUCTIONS IN SCHEDULES A, E, AND K ABOVE.

1. Refer to "A," "E," or "K."	2. Kind of Property (If Buildings, State also Material of Which Constructed).	3. Date Acquired.	4. Age When Acquired.	5. Cost, or if Acquired Prior to March 1, 1913, the Fair Market Value on That Date.	6. Repairs, Ordinary and Incidental.	Wear and Tear, Obsolescence, and Depletion Charged Off. 7. Rate.	8. Amount previous years.	9. Amount this year.	10. Losses not Compensated for by Insurance or Otherwise. Cause and How Amount Was Arrived at.
				$	$		$	$	

EXPLANATION OF DEDUCTIONS claimed in Schedule A, Items 7 and 19; Schedule B, column 5; Schedule E, column 7; Schedule K, Item 4; and Schedule M. (Attach separate sheet if necessary.)

K 4—Stock in Nenzel Crown Point Mining Co. Charged off as worthless $1325.00

M. - Red Cross $5.00 Jewis Relief 10.00 Police Relief 20.00

49-50

Q. Referring again to Schedule (B) it is shown that the agent has figured profit on shares $19,230.84?

A. Yes, sir.

Q. That is what the report shows?

A. Yes, sir.

Q. It is on the basis of that additional profit shown by this agent's report, in part at least, that the additional tax was assessed?

A. Yes, sir.

Q. I hand you this paper which has been marked Plaintiff's Exhibit One and ask you to state what that is.

A. It is a photostatic copy of my individual income tax return for the year 1920.

Q. Who did you obtain it from?

A. It was sent to me from the office of the Internal Revenue Commissioner.

[fols. 45 & 46] Q. Mr. Tucker, instead of the photostatic copy about which I ask you, I have been given a certified copy by counsel on the other side which I have had marked Plaintiff's Exhibit 1, in place of the other copy, and we offer this certified copy in evidence.

Mr. Toomey: No objection.

A. That is my signature on there.

(Here follows Exhibit 1, marked side folio pages 47, 48, 49, and 50)

[fol. 51] (Thereupon Plaintiff's Exhibit 1 was received in evidence, and is an income tax return on blank for net incomes of more than $5,000 for the calendar year 1920, showing total net income on which tax is to be computed of $46,467.74, and total tax of $5,172.92.)

By Mr. Garnett:

Q. Now this return, Exhibit 1, shows your net income of $46,467.34. Did that cover all your income except the profit on your stock in the Osage Mercantile Company at liquidation which is the matter in dispute in this suit?

A. I consider that covered all my income for that year.

Q. You didn't in this include any profit on your shares on liquidation of the Osage?

A. No, sir.

Q. But you put everything else in it?

A. Yes, sir.

Q. What was the amount of tax shown and paid on this return?

A. $5,172.92.

Q. In this return Mr. Tucker, you have shown the sum of $24,608.86 as dividends in one place and in another as distribution of partnership. Was that, in fact, earnings of the partnership of you and your brother for a period after the Osage Mercantile Company liquidated?

A. It was.

Q. Considering it as dividends as you did in computing the tax, the result was that you didn't compute a large enough tax.

A. I- was, yes, sir.

Q. Do you know how much additional tax would result from your failure to compute it?

A. I was informed yesterday it was eight per cent.

Q. That item not being a dividend but proceeds from a partnership would be subject to an eight per cent normal tax under the law?

A. So I understand.

Q. The eight per cent normal tax on that increases your tax liability by how much?

A. $1,900 and something.

Q. $1,968.71.

A. $1,968.71.

Q. Then the amount paid on your return of $5,172.92, and this additional sum of $1,968.71 resulting from the normal tax of eight per cent on your partnership earnings gives you a total tax liability on the basis of your return of $7,141.63. Is that the correct computation?

A. I think that would be correct, yes, sir.

Q. Did you afterwards pay additional tax?

A. Yes, sir. May I see that Dye report? Did he consider it as a dividend?

Q. No, he transferred it from dividends to partnership earnings.

A. He evidently computed it correctly then.

[fol. 52] Q. Yes, In Mr. Dye's report he made the correction of that error. Now how much additional tax was assessed Mr. Tucker?

A. 8,610.84.

Q. What year was that for?

A. Additional for the year 1920.

Q. I hand you this paper which has been marked Plaintiff's Exhibit No. 2, and ask you to state if that is a notice and demand for tax you received from the Collector of Internal Revenue at Oklahoma City, Oklahoma?

A. It is.

Q. That is known as a ten day notice and demand isn't it?

A. I think so.

Q. Dated October 4th, 1923. We offer this in evidence.

Mr. Toomey: No objection.

(Thereupon plaintiff's Exhibit No. 2 was received in evidence, and is in the words and figures following:)

PLAINTIFF'S EXHIBIT No. 2

"Income, War-Profits, and Excess Profits Tax

Form 7658

Notice and demand for Tax

United States Internal Revenue Service

Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, the Act provides that a penalty of five per cent of the amount of tax due will be added, plus interest at the rate of one per cent per month, from Oct. 15, 1923, until paid.

Dated Oct. 4, 1923.

Name and address: W. C. Tucker, Pawhuska, Okla.

Sept. 97.

Items: Add'l 1920 tax disclosed by audit in Washington. Total Assessment: $8,610.84."

Q. Did you afterward pay the sum of $8,610.84 additional tax?

A. Yes, sir.

Q. Did you obtain a receipt for it?

A. I did.

Q. I hand you this paper which has been marked Plaintiff's Exhibit No. 3, and ask you if that is the Collector's receipt for that tax?

A. Yes, sir.

Q. Was that paid under protest?

A. Yes, sir.

[fol. 53] Q. And in response to the notice and demand, Exh-bit 2?

A. Yes, sir. October 30, 1923.

Q. Under the terms of that notice and demand you are subject to penalty and interest on failure to pay?

A. Yes, sir.

Q. And to avoid that you paid this tax under protest and took the receipt?

A. Yes, sir.

Q. The receipt bears the endorsement, "Paid under protest?"

A. Yes, sir.

Q. We offer in evidence, Plaintiff's Exhibit No. 3.

(The instrument was thereupon received in evidence, being Plaintiff's Exhibit No. 3, and is in the words and figures following:)

PLAINTIFF'S EXHIBIT No. 3

"Taxpayer's Receipt for Income and Excess Profits Tax

Office Collector Internal Revenue

Paid under protest.

Form No. of return. Sept. 97-Commr's. 23—A. Add'l 1920.

Tax, $8,610. Cts. 84.

Name: W. C. Tucker.

Address: Pawhuska, Okla.

Received payment 10/30/23.

Acel C. Alexander, by M. Hawes, cashier.

Q. Now Mr. Tucker, did you file a claim of abatement and refund of tax before this sum was paid?

A. Yes, sir.

Q. Were you required to pay the tax before that claim was passed upon?

A. Yes, sir.

Q. Then did you later file a claim for refund of tax?

A. Yes, sir.

Q. I hand you this paper marked Plaintiff's Exhibit 4, and ask you if that is a carbon duplicate except as to the printed form of the claim for refund you filed?

A. Yes, sir.

Q. Was that filed immediately after the tax was paid?

A. I think it was, yes, sir.

Q. Can you say whether it was filed on or about the second day of November?

[fol. 54] A. It was filed early in November I am satisfied.

Q. What date is it verified?

A. First day of November 1923.

Q. Filed immediately after that date?

A. Yes, sir.

Q. We offer in evidence Plaintiff's Exhibit No. 4, being the claim for refund to which the witness has testified:

(Thereupon the instrument, Plaintiff's Exhibit No. 4, was received in evidence and is as follows:)

PLAINTIFF'S EXHIBIT No. 4

Notice to Collector

STATE OF OKLAHOMA,
County of Osage, ss:

W. C. Tucker, Pawhuska, Oklahoma

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete.

1. Business in which engaged: General Merchandise.
Period: From Jan. 1, 1920, to Dec. 31, 1920.

2. Character of assessment or tax: Income tax.

3. Amount of assessment or stamps purchased: $13,783.76.

4. Reduction of tax liability requested (Income and profits tax): $9,301.23.

5. Amount to be abated: None.

6. Amount to be refunded (or such greater amount as is legally refundable): $9,301.23.

7. Dates of payment: $5,172.92 installments in 1921. $8,610.84 paid 10-30-23.

8. District in which return was filed: Oklahoma.

9. District in which unpaid assessment appears: No unpaid assessment.

10. Amount of overpayment claimed as credit: None.

11. Unpaid assessment against which credit is asked; period from —— ——: None.

Deponent verily believes that this application should be allowed for the following reasons:

[fol. 55] That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said company as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax dated August 10, 1923, designated IT:PA:Fr-JRC-708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim. Said appeal was not considered in the asses'ment of the additional tax because not filed in time, and the taxpayer was advised by the Commissioner's letter of October 24, 1923, a copy of which is attached hereto and made a part hereof, that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence. The additional tax of $8,610.84 was paid under protest on October 30, 1923. The taxpayer is, therefore,

entitled to interest on the tax refunded from the date of payment.

(Signed) W. C. Tucker.

Sworn to and subscribed before me this 1st day of November, 1923. Lois Haynie, Notary Public. (Seal.)

Q. Now did you ever get a communication from the Commissioner of Internal Revenue in reference to your claim about which you just testified?

A. Yes, sir.

Q. I hand you this paper which is marked Plaintiff's Exhibit 5, and ask you when you received it, how and who from?

A. I received it probably late in April 1925. It is dated April 24th, 1925 from the treasury department; the Commissioner of Internal Revenue.

Q. And how is it signed?

A. Signed J. E. Bright, deputy commissioner by A. Lewis, head of division.

Q. We offer in evidence Plaintiff's Exhibit No. 5.

Mr. Toomey: This raises a small point. It might entail the question of costs in this case. Under date of April 24th, 1925 the department has allowed them to reconsider this question, reconsider their claim for abatement and claim for refund, and they are allowing him a refund of $216.00. [fol. 56] I don't know whether it is any part of this case or not. That refund claimed, $216.00, will come through in the regular course and the plaintiff will receive it the same as though this suit had never been filed. I don't think it ought to have any part in this case to carry costs with it. That would be the only effect. There is no other objection.

Mr. Garnett: This suit was filed I think last fall, the petition will show, or early in the winter, and included in the recovery sought in that petition is this particular item. Now after suit is filed and pending, and after the issues are joined the Commissioner transmits a letter saying there is a balance due us of $216.26, admitting that much liability of the amount we sued for.

The Court: That was before this suit was brought?

Mr. Garnett: No, sir. This letter is dated April 23, 1925.

Mr. Toomey: This specifically refers to your claim for abatement and claim for refund which was filed along last November. Was it November 1924?

Mr. Garnett: 1923.

Mr. Toomey: Any way, that is his claim for refund which the taxpayer filed at Washington a long time prior to the commencement of this suit. I don't think the department ought to be penalized for costs on this. It is a small matter. There is no judgment necessary for them to get this money. This is scheduled through the Collector's office at Oklahoma City, and they will get the money just the same.

The Court: However, that might be I think it is proper to receive it in evidence.

(Thereupon, Plaintiff's Exhibit 5 was received in evidence, and is in the words and figures following:)

PLAINTIFF'S EXHIBIT No. 5

Treasury Department, Washington

April 24, 1925.

IT: PA: 2. RO'L-203.

Mr. W. C. Tucker, Pawhuska, Oklahoma.

SIR: Your claim for the abatement of $8,610.84 and refund of $690.39, aggregating $9,301.23, and your claim for [fol. 57] refund of $9,301.23, income and surtaxes for the year 1920, have been examined.

The claims are based on the following statement:

"The proposed assessment of additional tax is based upon a Revenue Agent's report under date of June 5, 1922, and transmitted under date of June 17, 1922. In that report the Revenue Agent has charged the taxpayer with the profit derived from the liquidation of the Osage Mercantile Company in 1920 in the sum of $19,230.84. This amount is set up as additional income and the larger part of the proposed additional tax rests upon this item.

"The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis

for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report."

A reexamination of your return and the Revenue Agent's report for 1920 in connection with your protests and other data submitted, results in your tax liability being reduced from $13,783.76 to $13,567.50, the details of which are shown in a separate communication.

Your claim for refund of $9,301.23 will be allowed for the amount of the overassessment as above indicated in the amount of $216.26 and rejected for the balance of $9,084.87. The combined claim for abatement of $8,610.24 and refund of $690.79, aggregating $9,301.23, will be rejected. The abatement portion, however, will not have to be paid, because, owing to Section 250 (d) having been complied with, the abatement portion of the claim was not accepted, that is, abatement of the assessment was not allowed.

Respectfully, J. G. Bright, Deputy Commissioner,
by A. Lewis, Head of Division.

[fol. 58] By Mr. Garnett:

Q. Have you ever received a refund of the $216.26 referred to in the letter, Exhibit 5?

A. No, sir, I have not.

Q. Have you ever received any refund of any part of this additional tax you paid in October 1923?

A. No.

Q. Have you ever received any notice of rejection of your claim or action on your claim for refund prior to this letter of April 24, 1925?

A. I think not. Not that I remember at this time.

Q. Mr. Tucker, your payment of taxes of $5,172.92 on your return and the payment of this additional assessment of $8,610.84 makes your total tax payments for the year 1920, $13,783.76. Is that correct?

A. Yes, sir.

Q. Now your true tax liability as shown on your return after correction of the error in handling the earnings from the partnership shows $7,141.63?

A. I think that is correct, yes, sir.

Q. Deducting that from your total tax payment leaves $6,642.13?

A. Yes, sir.

Q. This latter sum I have just quoted then is the balance which you now claim a refund on?

A. It won't be that much if I am going to get this other check.

Q. Well, but you haven't gotten the check.

A. I haven't gotten the check.

Q. That is the amount you claim you are entitled to recover of the tax you have paid?

A. Yes, sir.

Q. The amount you are suing for in this action—you sued for more than that—that is the amount you now say you are entitled to in this action?

A. Yes, sir.

Q. In your cross-examination counsel asked you whether notice of any sort was given when you changed from a corporation to a partnership. You testified as to publishing notice of the dissolution of the corporation and formation of the partnership. Did you make any other advertisements of the fact that you were changing?

A. We did. We made a display advertisement.

Q. What was the nature of that?

A. Announcing the dissolution of the corporation and continuation under the name of Osage Mercantile Company, a partnership.

Q. Partnership composed of whom?

A. R. W. Tucker and myself.

Q. How extensively did you advertise?

A. That was in the daily paper up there at that time.

[fol. 59] Q. Just had one daily?

A. Just had one paper and in one weekly.

Q. About how long did you carry that?

A. I think it probably was one publication in each paper, the display advertisement. The legal notice was carried there quite awhile.

Q. Was that published in the same paper if you know?

A. I think it was published in the daily. I know I had numerous inquiries as to what was the matter.

Q. Do you have here a certified copy of the court's decree dissolving that corporation in July 1920?

A. Yes, sir.

Q. And you have the original articles of co-partnership between yourself and R. W. Tuckeer, forming a partnership under the name of the Osage Mercantile Company?

A. Yes, sir.

Q. They show that the dissolution of the corporation and organization of the partnership took place in the month of July 1920?

A. Yes, sir.

Q. Now yesterday you testified as to the amount of tax liability of the Osage Mercantile Company outstanding at liquidation which was afterward paid by the stockholders who received the assets in liquidation. Have you got those figures in the form of a statement?

A. Yes, sir.

Q. I hand you this paper marked Plaintiff's Exhibit 6, and ask you if that sets forth the items of payment making up those taxes with the dates of payment of the Federal income taxes?

A. Yes, sir.

Q. We offer in evidence Exhibit 6. That is the table of the taxes about which he testified orally.

(Thereupon the instrument referred to, Plaintiff's Exhibit No. 6, was received in evidence, and is in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 6

Tax liability of Osage Mercantile Company outstanding at liquidation and assumed by W. C. and R. W. Tucker July 22nd, 1920, as evidenced by payments made as outlined below.

Federal Income Tax Paid

Sept. 13, 1920	$3,663 43	on 1919 tax.
Dec. 10, 1920	3,663 43	on 1919 "
March 14, 1921	2,680 09	on 1920 "

[fol. 60] June 15, 1921	2,680.08	on 1920	"
June 15, 1921	14,093.35	on 1918	"
Sept. 14, 1921	2,680.08	on 1920	"
Dec. 13, 1921	2,680.08	on 1920	"
Jan. 25, 1923	4,327.86	on 1917	"
Total	36,468.40		
Less refund Nov. 15, 1924:			
Treasury check No. 470980	1,543.20		
		$34,925.20	
Capital stock tax for 1920		166.00	
Advalorem taxes for 1920		2,474.69	
Total		$37,565.89	

Recross-examination.

By Mr. Toomey:

Q. You owned half interest in this partnership after the dissolution?

A. Yes, sir.

Q. Did you sustain any loss of earning power by reason of the change?

A. I think not.

Q. Your income tax return, your personal return marked Plaintiff's Exhibit No. 1 here shows that you received as your distributive share from the Osage Mercantile Company, a partnership in 1920, the sum of $24,608.86. This is correct isn't it?

A. Yes, sir.

Q. That represented your half interest?

A. Yes, sir.

Q. The earnings of that partnership then for the last five months of 1920 were over $49,000?

A. Five and one-third months.

Q. As a matter of fact, Mr. Tucker, those were the highest earnings that the mercantile company ever sustained for any previous five months of its existence wasn't it?

A. Yes, sir.

Q. This is the minute book of the corporation is it not? (Handing witness book.)

A. Yes, sir.

Q. And what is this book here.

A. That is the book known as our general ledger No. 4.

Q. It is part of the records of the company?

A. Part of the records of the Osage Mercantile Company, a corporation.

Q. The dividends declared by the corporation in the regular way are set forth in the minute book are they not?

[fol. 61] A. I think they are all in there. They should be.

Q. It was the policy of the company to declare dividends at the regular meetings of the directors?

A. It was the policy of the company when a dividend was anticipated to call a meeting and authorize it.

Q. Going back to this real estate transaction in May 1913, what did you personally receive out of that transaction?

A. I received my stock in the Mercantile Real Estate Company.

Redirect examination.

By Mr. Garnett:

Q. Mr. Tucker, since your testimony yesterday have you refreshed your recollection as to just how the transfer of the real estate from the Osage Mercantile Company to the Mercantile Real Estate Company was handled?

A. I have in conversation with my brother in line with his testimony yesterday.

Q. How was that done?

A. It was done by the stockholders of the Osage Mercantile Company, the corporation, giving their individual checks to the Mercantile Real Estate Company, and those checks were turned over to the Osage Mercantile Company, the corporation, in payment for the real estate, and then after that the Osage Mercantile company, the corporation, paid out a cash dividend of $18,000 with those checks, and $3,000 additional.

Q. What was the amount of those checks given to the Mercantile Real Estate Company for its stock?

A. The gross amount was $15,000.

Q. Then what distribution, or what amount did the Osage Mercantile Company distribute in dividends?

A. Distributed $18,000.

Q. Where is that dividend record? Is it this book?

A. Under undivided profits.

Q. And this book, general ledger No. 4 about which counsel just asked you, at page 285 shows your undivided profit account?

A. Yes, sir.

Q. And it shows a dividend of $18,000 on May 8th, 1913?

A. Yes, sir.

Q. And that is the dividend about which you have just testified as being made up of $15,000 from the checks, or representing on the books of the corporation the checks received from the Mercantile Real Estate Company for the real estate?

A. Yes, sir.

Q. And $3,000 additional?

A. Yes, sir.

[fol. 62] Q. And on May 13th, $25,150 is shown there marked real estate. What was that?

A. That was the balance in the real estate account that was charged to undivided profits to get it off the books.

Q. The real estate account was $40,150?

A. Yes, sir, the real estate account, the balance was $40,150.

Q. All these dividends are indicated in this record as cash are they not?

A. Yes, sir.

Q. And this of May 13th is marked real estate?

A. Yes, sir.

Q. This minute book to which counsel referred at page 99 purports to contain the minutes of a meeting of May 6th, 1913 covering pages 99, 100 and 103. Now are those three pages to which I have referred the minutes of the meeting of May 6th?

A. Yes, sir, 1913.

Q. Of the records of the Osage Mercantile Company?

A. Yes, sir.

Q. Was action taken there relative to disposing of the real-estate?

A. It was.

Q. Was that the basis for the disposal of it?

A. Yes, sir.

Q. We offer this minute in evidence.

By Mr. Toomey:

Q. What became of that other page?

A. I don't know. It is the first time I knew there wasn't one there.

Q. You can mark that Plaintiff's Exhibit No. 7.

Mr. Garnett: The minutes referred to are marked Plaintiff's Exhibit No. 7 for identification.

Thereupon, the minutes referred to, marked Plaintiff's Exhibit No. 7, were received in evidence, and are as follows:

PLAINTIFF'S EXHIBIT NO. 7

"Pawhuska, Okla., May 6, 1913—
4:00 o'clock p. m.

"At the regular meeting of the Board of Directors the following named were present: W. C. Tucker, G. W. Hutchins, J. W. Ferguson, W. T. Mosier, W. S. Mathews and R. W. Tucker, being all the directors and stockholders of the company.

The Board was called to order by W. C. Tucker, president. W. T. Mosier presented the following resolution and moved its adoption:

[fol. 63] "Resolved that W. C. Tucker, president of the Osage Mercantile Company is hereby authorized and empowered and directed to sell all the real estate owned by this corporation, Osage Mercantile Company, to-wit: Lots, 17, 18, 19, 33, 34, 35 and the south fifteen feet of lot 36 in block 84, the east one-half of lot 11 and all of lot 12 in block 67; lots 9, 10 and 16 feet west side of lot 11 in block 8, and lots one and two in block 40 all in Pawhuska, Oklahoma as shown by the official plat thereof to the Mercantile Real Estate Company, a corporation located at Pawhuska, Oklahoma, for a consideration of $25,000 to be paid as follows: $15,000 in cash, and for the remaining $10,000 the said Mercantile Real Estate Company assumes and agrees to pay the $10,000 mortgage due J. W. Perry on said real estate. The said Mercantile Company agrees to assume the paving taxes and W. C. Tucker as president of the Osage Mercantile Company is hereby authorized, empow-

ered and directed to deliver a warranty deed subject to the foregoing named incumbrances from the Osage Mercantile Company to the said Mercantile Real Estate Company for all the above named real-estate. Motion to adopt the foregoing resolution was seconded by J. M. Ferguson and upon a show of hands all members present as above set forth voted in the affirmative, and the resolution was declared adopted.

J. M. Ferguson then presented the following resolution, and moved its adoption:

"Resolved that $10,000 be credited to the real estate account and charged to the bills payable account, the same being the amount of real estate mortgage due J. W. Perry and assumed by the Mercantile Real Estate Company. The motion to adopt the foregoing resolution was seconded by R. W. Tucker, and upon a show of hands all members present as above set forth voted in the affirmative and the resolution was declared adopted. W. T. Mosier then presented the following resolution and moved its adoption: "Resolved that a dividend of 60 per cent on the capital stock be declared payable May 7th, 1913, and that the secretary and treasurer be instructed to pay the same. The motion to adopt the foregoing resolution was seconded by G. W. Hutchins, and upon a show of hands all parties present voted in the affirmative and the resolution was declared adopted. Whereupon, the meeting adjourned.

(Signed) R. W. Tucker, Secretary and Treasurer. W. C. Tucker, President. W. S. Mathews, J. M. Ferguson."

[fol. 64] By Mr. Garnett:

Q. Mr. Tucker, was the $18,000 dividend about which you have testified as dated on May 8th, and appearing on page 285 of Ledger four the 60 per cent dividend authorized by this resolution?

A. It was.

Q. Were you president of the company at that time?

A. Yes, sir.

Q. And who was secretary and treasurer?

A. My brother, R. W. Tucker.

Q. He had both of those offices?

A. Yes, sir.

Q. Now was the transfer of the real estate carried out in accordance with those minutes?

A. It was.

Q. The $10,000 indebtedness was assumed by the Mercantile Real Estate Company?

A. Yes, sir.

Q. And the Mercantile Real Estate Company paid in $15,000?

A. Yes, sir.

Q. You credited real estate and charged bills payable did you or the other way?

A. Yes, sir; charged bills payable and credited real estate.

Q. The only consideration received for that real estate was the $25,000 paid as indicated in that resolution, $15,000 by check and assuming an indebtedness of $10,000. That is the only consideration paid the Osage Mercantile Company for the real estate. Is that right?

A. To the Osage Mercantile company as a corporation, yes.

Q. The stockholders understood they were getting their pro-rata share out of the other?

A. For the stock.

Q. They held stock in the real estate company in the same proportion?

A. Yes, sir.

Q. But as between the two corporations the consideration, and only consideration passing from the Mercantile Real Estate Company and received by the Osage Mercantile Company was the $15,000 paid by check and assuming a debt of $10,000?

A. Yes, sir.

Q. The remaining value of $25,150 in the real estate account you just charged off to balance the account?

A. Yes, sir, charged it to undivided profits.

Recross-examination.

By Mr. Toomey:

Q. This $18,000 dividend declared there was composed of $15,000 received from the Mercantile Real Estate Company and $3,000 of other funds?

A. Yes, sir.

Q. That $15,000 did you get back in the form of money, or did you get those same checks back endorsed by the corporation?

[fol. 65] A. Well, I can't say. I will have to say what somebody else told me. My brother told me last night how the deal was.

Q. You have no independent recollection?

A. I don't remember.

Witness excused.

Mr. Garnett: Plaintiff rests.

COLLOQUY BETWEEN COUNSEL

Mr. Toomey: I think at this time we can simplify this case a little bit by making a stipulation here. It is stipulated that the value of the stock at March first, 1913 including the real estate and the dividends which were subsequently taken out based upon the net worth of the corporation was $356.86 per share. That is the figure used by the revenue agent. It is also agreed that if the Government is correct in reducing that March first value by the amount of this real estate and the dividends, that that valuation per share will be reduced $153.15, leaving a net March first value per share of $203.71. I believe it is also agreed that at the date of liquidation the assets of the corporation valued upon the same basis, the stock was worth $319.42 per share. That if the court should hold that the Government is wrong in its method of computing the March first, 1913 value, hold we are wrong entirely, that the plaintiff is entitled to judgment for $6,642.13, the maximum amount of the recovery will be only $6,642.13. The correct means of treating the $216.26 will be reserved for the determination of the court.

Mr. Garnett: It is understood that if the Government is wrong as counsel as stated as to the handling of the dividends the amount refunded of taxes will be $6,642.13.

Mr. Toomey: Yes, sir.

Mr. Garnett: With interest from date of payment at six per cent and if the Court should hold that the refund of $216.26 which the Commissioner has announced in the letter the tax-payer is entitled to will not be included in the judgment, then that would be deducted from the total amount so refunded.

The plaintiff reserves and by this stipulation does not waive the question of whatever benefit he may have on good will value shown to have existed March first, 1913, and also existed at July 1920, but which the plaintiff contends is not distributable to the stockholders on liquidation.

[fol. 66] S. O. Dye was thereupon called as a witness on behalf of the defendant and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Toomey:

Q. What is your name?
A. S. O. Dye.
Q. Were you ever connected with the revenue service?
A. Yes, sir.
Q. Where?
A. In Oklahoma, Arkansas and Washington.
Q. During your employment as a revenue inspector with the Treasury Department, did you have occasion to investigate the books of the Osage Mercantile Company?
A. Yes, sir.
Q. Did you have occasion to make investigation of the personal tax liability of W. C. Tucker, one of the stockholders of that corporation?
A. Yes, sir.
Q. In making a report upon the individual liability of W. C. Tucker, did you have occasion to go into the question of computing the taxpayer's income from the liquidation of the Osage Mercantile Company, a corporation?
A. I did.

Q. And in so doing you had occasion to consider the proper method of arriving at the March first value of Mr. Tucker's interest in the corporation did you not?

A. Yes, sir.

Q. Will you state to the Court just how you arrived at the March first value of that stock?

A. May I have the report?

Q. The notes which you are using now are your own notes in your own handwriting, which you had at the time are they not?

A. Yes, sir. On making this determination of the investment on March first 1913, I started with the investment per books shown in the ledgers and then this amount was adjusted for surplus earned prior to March first 1913 which had been distributed in the form of dividends or turned over to the Mercantile Real Estate Company in May of that year. This was done on the theory that the Mercantile Real Estate Company was a——

Mr. Garnett: I object to him stating his theory or reasons for his method. He can tell the fact of the method he used, but I don't feel he can testify as to what method should have been used, because that is the real question in the case.

By The Court: Overruled.

Mr. Garnett: Exception.

Mr. Toomey: Go ahead.

[fol. 67] A. This procedure was followed because in determining the value of the assets distributed in 1920 it seemed necessary to segregate from the March first, 1913 value of the stock of the Osage Mercantile Company those values which had been transferred into another organization, and the stock of which was still held by the stockholders at the time the mercantile company or the Osage Mercantile Company was liquidated. After this division it had no less than it had before——

Mr. Garnett: I object to that. That is purely a matter of argument.

The Court: Let's hear fully how this came about. It won't be binding on the court unless it is sound, but let the witness explain fully.

Mr. Garnett: Exception.

Q. Explain to the court how you did this thing.

A. It was done in that way because after the division the stockholders had the same assets that they had before except that it was represented by shares of the two corporations instead of one.

Q. In making the examination you had occasion to go over the books of the corporation did you not?

A. Yes, sir.

Q. And have you since refreshed your memory by making a further examination?

A. I saw the books this morning.

Q. Handing you what the plaintiff in this case has already identified as the general ledger of the corporation, I will ask you to state how the transfer of that real estate was carried on the books of the corporation?

A. According to these books the real estate was carried at fifty thousand and one hundred and fifty dollars, and at the time the other company was created on May 13th, 1913, the undivided profits are charged with $25,150. The real estate account was credited with $50,150, and the notes payable charged $10,000.

Q. Does that show that real estate was transferred as a dividend?

A. No, sir.

Cross-examination.

By Mr. Garnett:

Q. How did you say it was transferred in that record?

A. In this record it was transferred as a sale at $15,000.

Q. That is the record transaction that it was sold for $15,000 by the Osage Mercantile Company to the Mercantile Real Estate Company?

A. Yes, sir.

[fol. 68] Q. Then it would necessarily show if the sale was only for $15,000 that the loss of $25,150 was charged off to undivided profits or profit and loss wouldn't it?

A. Not necessarily.

Q. Where did that go then?

A. That might have had the effect of a gift to the other corporation considering the fact that there was an equal inter-estate in both and each stockholder shared equally in the new arrangement.

Q. Well, what would it indicate on the books?

A. The books show a loss.

Q. Well, that was my question. The books show that a loss of $25,150 was entered growing out of this real estate transaction. It that right?

A. Yes, sir.

Q. You say that it might have been a gift from the old corporation to the new because the stockholders in the new corporation had exactly the same stock holdings as in the old. Is that your statement?

A Apparently this [entiry] is made only to clear the account. The way it was handled they had agreed among themselves, they were all equally interested——

Q. Wait a minute. Were you present when they made the agreement?

A. Certainly not.

Q. I suggest you testify from what the records show or from what knowledge you gained from them. My question is, you considered it might be a gift from the old company to the new company because the stockholders in the new company owned stock in the same proportion as in the old?

A. And because in filing their consolidated returns they claimed they had a paid in surplus into the new company.

Q. Of the actual fair market value of the real estate at that time?

A. Yes, sir.

Q. Now is there any other reason why you consider it a gift?

A. That would substantiate my reason.

Q. Did you consider it a gift and do you now consider it a gift from the old company to the new?

A. Yes, I think I should.

Q. Then it wasn't a dividend was it?

A. No.

Q. Mr. Dye, you took the book value assets on March 1st, 1913 and adjusted values by distributions from those made after that date did you?

A. Yes, sir.

[fol. 69] Q. Did you go back of that date to restore to March 1st value any items which have been charged off on the books and are still owned by the company?

A. I don't understand.

Q. Did you go back prior to March first in order to ascertain and to restore to surplus on March first 1913 any items which had been charged off on the books and were still owned by the company?

A. No, sir.

Q. You adjusted just on one side of that date, that is, the subsequent period?

A. I started at that time and built it down.

Redirect examination.

By Mr. Toomey:

Q. Are you a certified public accountant under the laws of the State of Oklahoma?

A. Yes, sir.

Q. Assuming that by this transaction they were merely making a division of their assets would it not be a usual way of handling that as a book-keeping entry to clear their books just as they did there?

A. I think so.

Recross-examination.

By Mr. Garnett:

Q. Let me see if I understand you clearly. Do you classify this transaction whereby the real estate was disposed of as a dividend, a sale or a gift, or a combination of two or more of them?

A. According to the book record it is a sale, but to make a strict sale there must be a willing buyer and willing seller, and if this had been with outside parties there couldn't have been such a sale.

Q. They would have asked a higher consideration. What do you term it then a gift or combination of sale and gift?

A. I should say it was a combination sale and gift.

Q. Not a dividend?

A. Not a dividend.

Redirect examination.

By Mr. Toomey:

Q. Might it not have been a split in their assets. Isn't that in effect what the books show?

A. No, I can't say that, because their records show a sale and their minute books show a sale.

[fol. 70] Recross-examination.

By Mr. Garnett:

Q. The result was that the assets were divided up and owned by two corporations after this transaction instead of being owned by only one as before?

A. Yes, sir.

Redirect examination.

By Mr. Toomey:

Q. And the result was a split of the assets wasn't it?

A. I'd rather not answer.

(Witness excused.)

Offer in Evidence

Mr. Toomey: I have a certified copy, a photostatic copy of a letter which I desire to have marked as an exhibit and introduce and that is our case.

The Court: On what subject?

Mr. Toomey: It is a letter written by the Osage Mercantile Company, an original paper on file in the department in which it sets forth their version of this transaction. It is a paper requesting that the Osage Mercantile Company and Osage Real Estate Company may consolidate their income and capital for the purpose of excess profits tax return.

Mr. Garnett: That is of no materiality here because the statute expressly authorizes affiliated corporations making consolidated returns.

The Court: Let it be received for what it is worth.

(Thereupon the instrument identified as Government's Exhibit (A), was received in evidence and is as follows.)

DEFENDANT'S EXHIBIT A

"Statement

The Osage Mercantile Co. was organized in 1902, under the laws of Oklahoma, with a capital stock of $15,000.00, which was increased to $30,000.00 by a stock dividend in 1906.

January 1st, 1913 its invested capital was $103,804.86 of which amount $50,150 was invested in real estate, as shown by inventory of that date.

On or about May 8th, 1913 this real estate was transferred to The Mercantile Real Estate Co., an Oklahoma corporation organized at that time and all the stock of that new [fol. 71] company was owned by the stockholders of the Osage Mercantile Co., in same proportion as these stockholders held stock in the Osage Mercantile Co.

Since that time all the stock of the real estate company has been owned by the stock holders of the Osage Mercantile Co. with the exception of a small interest, less than one-third.

In figuring Corporation Excess Profits we submit that the capital invested in the Mercantile Real Estate Co. should be added to the invested capital of the Osage Mercantile Co. for the reason that the two corporations are, in fact, a continuation of the one business established in 1902, the real estate being taken out of the mercantile business in 1913 to facilitate handling both branches of the business in accordance with Oklahoma law.

We respectfully ask that the figures of the two corporations be combined for the purpose of fixing amount due as Corporation Excess Profit Taxes, as follows:—

Assets, Merc. Real Estate Co., May 8th, '13		$50,150.00
New building, added since,		19,216.55
Surplus, Jan. 1st, 1917		10,942.73
		80,309.28
Less indebtedness, Jan. 1st, 1917		22,414.80
Invested capital, R. E. Co		57,894.48
Invested capital of Osage Merc. Co. Jan. 1st 1917, see statement		81,149.88
Total invested capital of the two corporations, Jan. 1st, 1917		$139,044.36
Profits, 1917, Osage Merc. Co	$43,729.08	
" " Merc. R. E. Co	1,810.90	
Combined profits	$44,539.95	

We herewith submit a consolidated return and respectfully ask acceptance of same as our report.

To pay the tax figure on our small invested capital would be inequitable as compared to other firms doing about the same volume of business in this section of the country, and whose invested capital is about the same [fol. 72] as the combined capital of our two corporations.

Respectfully submitted.

Osage Mercantile Company. W. C. Tucker, Pawhuska, Oklahoma.

APPROVAL OF BILL OF EXCEPTIONS BY COUNSEL AND PRAYER FOR APPROVAL

The undersigned, attorneys for the defendant, hereby acknowledge service of the bill of exceptions in the above entitled cause this 20th day of July, 1925.

We have examined the said bill of exceptions in the above entitled cause and have no suggestions or amendments to offer thereto and hereby consent that said bill of exceptions may be presented to the Hon. John H. Cotteral,

presiding and trial judge, at any time and place, and without further notice to us.

James A. Ingraham, Asst. U. S. Attorney, Attorneys for Defendant.

Prayer of Plaintiff for Approval of Bill of Exceptions

And now in furtherance of justice and that right may be done, the plaintiff, W. C. Tucker, presents the foregoing as and for his bill of exceptions in the above entitled cause, and prays that the same be settled, allowed, signed and filed as such.

Chas. H. Garnett, Attorney for Plaintiff.

In United States District Court

Order Settling Bill of Exceptions

Now on this 20th day of July, 1925, and within the time allowed by the order of the Court for the presentation and filing by the plaintiff of his bill of exceptions, comes the plaintiff above named by his attorney, Charles H. Garnett, Esq., and present to the Honorable John H. Cotteral, the judge who presided at the trial of said cause, the foregoing bill of exceptions, and prays that the same may be settled, [fol. 73] allowed, signed and ordered filed as a part of the record in said cause, which is accordingly done.

John H. Cotteral, United States District Judge, Western District of Oklahoma.

In United States District Court

Plaintiff's Motion for Judgment—Filed June 15, 1925

Comes now the plaintiff above named at the conclusion of all the evidence in the case and moves and asks the court to render judgment in his favor upon the evidence in the case and the law applicable thereto, for the sum of $6,642.13, with interest thereon at the rate of 6% per

annum from October 30, 1923, or the total sum at this date of $7,289.73 and for the costs of this action.

Chas. H. Garnett, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION TO DISMISS—Filed June 13, 1925

Comes now the above named defendant, thru the undersigned his attorney, and at the close of all the testimony, both parties having rested, and moves the Court for judgment in his favor, for the dismissal of the plaintiff's petition and for his costs herein incurred.

James A. Ingraham, Assistant United States Att'y,
Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

No. 2990. Law

W. C. TUCKER, Plaintiff,

vs.

ACHL C. ALEXANDER, Collector of Internal Revenue, Defendant

JUDGMENT—Filed June 13, 1925

This cause came on to be heard on the 12th day of June, 1925, a judicial day of the Special May 1925 Term of the [fol. 74] above-entitled court. Both parties were present, and the plaintiff further appeared by Charles H. Garnett, his attorney, and the defendant by James A. Ingraham, Assistant United States District Attorney, and Floyd F. Toomey, Special Attorney of the Bureau of Internal Revenue. Both parties announced ready for trial, and both parties having duly made and filed herein their waiver in writing of a trial by jury, the Court thereupon proceeded with the trial without a jury. The taking of evidence was begun, but not having been completed at the

close of the day, Court recessed and the trial of the cause was continued to 9:00 o'clock A. M. of the following day. On the 13th day of June, 1925, the trial was resumed and the taking of evidence was completed and both parties rested their case.

Thereupon the plaintiff filed his motion in writing for judgment in his favor for the sum of $6,642.13 with interest thereon at the rate of six percentum per annum from the 30th day of October, 1923, and costs of the action. Thereupon the defendant filed his motion in writing for judgment in his favor and for costs.

Thereupon the cause was argued to the Court, and the Court having heard the evidence and the oral testimony of witnesses sworn and examined in open court, and having heard the arguments of counsel, and being fully advised in the premises, finds that on the 30th day of October, 1923, and after notice and demand by the defendant, as Collector of Internal Revenue for the District of Oklahoma, the plaintiff paid under protest additional income tax assessed against him by the Commissioner of Internal Revenue for the year 1920 in the sum of $8,610.84; that on the 2nd day of November, 1923, the plaintiff filed with the Commissioner his claim for refund of the said tax and that the said claim was held without action and neither rejected nor allowed by the Commissioner until April 24, 1925, on which date by letter to the plaintiff, he allowed the same for the sum of $216.26 only and rejected it for the balance; that the amount of claim so allowed has not yet been paid; that this action was commenced by the plaintiff in this court on the 21st day of October, 1924; that the plaintiff admits that, by mistake in computation, the tax shown by and paid with his original income tax return was erroneously fixed at $5,172.92, whereas the correct amount thereof was $7,141.63 and that of the additional tax assessed against him and paid under protest, the sum of $1,968.71 was correctly assessed, and that he now claims only the sum of $6,642.13 of said additional assessment to [fol. 75] have been erroneously and illegally assessed, collected and paid; that the said sum of additional tax in controversy is based upon an alleged profit on 150 shares of stock in the Osage Mercantile Company, a corporation, which were owned by the plaintiff at and prior to March

1st, 1913, and which he realized upon in liquidation of said corporation on July 20th, 1920; that the assets of the corporation were not sold at liquidation, but were distributed in kind to the plaintiff and R. W. Tucker, his brother, who then owned all the stock, and who assumed all of its liabilities, whereupon it was formally dissolved by a judicial decree; that the said plaintiff and his brother, R. W. Tucker, with the same proportionate interests, continued as a copartnership, the same business, under the same name and at the same location as was formerly conducted by the said corporation; that from prior to March 1, 1913, to its dissolution the corporation had 300 shares of stock of the par value of $100.00 a share issued and outstanding, and was actively engaged in carrying on the business for which it was chartered and organized; that the fair market value of said stock on March 1, 1913, based on its book or asset value was $356.86 per share; that on March 1, 1913 the assets of said corporation consisted of the mercantile business proper including merchandise, fixtures, accounts, etc., and considerable outside real estate; that shortly prior to May 13, 1913, a new corporation, known as the Mercantile Real Estate Company, with a capital stock of $15,000.00, was formed by the stockholders of the Osage Mercantile Company; that the stockholders of the Osage Mercantile Company thereupon subscribed for all the stock of the new corporation and in the same proportion as their stockholders in the old corporation; that said stockholders then issued their personal checks totalling $15,000.00 to the new corporation in payment for its capital stock; that the new corporation thereupon paid this $15,000.00 to the old corporation in exchange for a conveyance under date of May 13, 1913, of all of its real estate, which said real estate had a book or asset value of $40,150.00; that the old corporation thereupon declared a dividend of the same $15,000.00 back to its stockholders; that the old corporation, the Osage Mercantile Company, continued its mercantile business proper until its dissolution on July 20, 1920; that the new corporation, the Mercantile Real Estate Company, is still in existence and the plaintiff still owns the stock which he acquired in it at its organization as above stated; that during the period be-

tween March 1, 1913 and May 14, 1913, the Osage Mer-
[fol. 76] cantile Company declared from its surplus earned prior to March 1, 1913, cash dividends in the sum of $5,796.33; that in determining the fair market value of the plaintiff's stock in the Osage Mercantile Company as of March 1, 1913, for the purpose of determining the gain derived by him upon said stock upon the liquidation of the Osage Mercantile Company on July 20, 1920, the value of real estate so transferred to the Mercantile Real Estate Company on May 13, 1913, viz., $40,150.00, together with the said cash dividends to the extent of $5,796.53, distributed between March 1, 1913, and May 14, 1913, or a total of $45,946.53 was excluded by the Commissioner of Internal Revenue, thereby reducing the March 1, 1913, value of said stock to $203.71 per share; that the amount realized by the plaintiff at liquidation of the corporation on July 20, 1920, was $319.46 per share, and deducting therefrom the above March 1, 1913, value of $203.71 per share leaves the plaintiff a profit or gain in realization on his stock of $115.75 a share; and that it was upon this profit per share on 150 shares that the additional tax in question was assessed by the Commissioner, but it is now admitted that such additional tax included an overassessment of $216.26 as shown by the Commissioner's letter of April 24, 1925.

The Court further finds from the primary facts stated above that for the purpose of determining the taxable gain derived by the plaintiff on his stock in the Osage Mercantile Company, upon its liquidation on July 20, 1920, the March 1, 1913 value thereof was properly determined in the manner above set forth to be $203.71 per share, and that his gain on his stock was properly arrived at by deducting said March 1, 1913, value from the amount realized thereon at liquidation as above set forth, and that, therefore, the additional tax assessed by the Commissioner of Internal Revenue, with the exception of the sum of $216.26 above referred to, was properly and legally assessed, collected and paid.

The Court further finds that any good will possessed by the Osage Mercantile Company on March 1, 1913 was also enjoyed by the company at the time of its dissolution on

July 20, 1920; that any such good will as may have existed inhered in and attached to the business, the name, the location and the owners thereof, and that it followed the business into the succeeding partnership enterprise and was enjoyed by the owners thereof who were the sole owners of the corporation at the time of its dissolution; [fol. 77] that any good will value which may have attached to the plaintiff's stock in excess of its book value on March 1, 1913, likewise attached to his stock on July 20, 1920, and that, therefore, such good will value, if existent, could in no way affect the taxable gain derived by the plaintiff upon the liquidation of the corporation.

The Court, therefore, finds the issues generally for the defendant, and further finds that since the Commissioner of Internal Revenue has allowed the plaintiff's claim for refund in the amount of $216.26, and that such amount of refund will be paid in due course by a Treasury check, the plaintiff should not recover judgment for the same in this action, nor for costs, but that the judgment rendered herein should be for the defendant for costs without prejudice to the plaintiff's right to receive said refund of $216.26.

The Court further finds that the motion of the plaintiff filed herein for judgment in his favor should be overruled and denied, and that the motion of the defendant filed herein for judgment in his favor should be sustained and granted. To all of which findings of the court the defendant at the time excepted and his exception is allowed.

It Is Therefore, Considered, Ordered and Adjudged by the court that the motion of the plaintiff herein for judgment in his favor be, and it is hereby, overruled and denied, to which order, ruling and judgment of the court, the plaintiff at the time excepted and his exception is allowed.

It is further considered, ordered and adjudged by the court that the motion of the defendant filed herein for judgment in his favor be, and it is hereby, sustained and granted, to which order, ruling and judgment of the court the plaintiff at the time excepted and his exception is allowed.

It is further considered, ordered and adjudged by the court that the plaintiff take nothing in this action, and that the defendant have judgment for his costs, and that all costs of the action be, and they are hereby, taxed and ad-

judged against the plaintiff, but that this judgment shall be and is without prejudice to the plaintiff's right to demand and receive the refund of tax in the sum of $216.26 already allowed him by the Commissioner of Internal Revenue, to which order and judgment of the court the plaintiff at the time excepted, and his exception is allowed.

Thereupon, on request of the plaintiff and for good cause shown, it is ordered that the plaintiff be granted sixty [fol. 78] days from this date in which to make, serve and file his bill of exceptions herein.

Done in open court this 13th day of June, A. D. 1925.

John H. Cotteral, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed July 20, 1925

To the Honorable John H. Cotteral, Judge of said Court:

Now comes W. C. Tucker, the plaintiff above named, by Chas. H. Garnett, his attorney, and feeling himself aggrieved by the final judgment of this court entered against him and in favor of Acel C. Alexander, Collector of Internal Revenue, the defendant above named, on the 13th day of June, A. D. 1925, hereby prays that a writ of error may be allowed him from the United States Circuit Court of Appeals for the Eighth Circuit to the District Court of the United States for the Western District of Oklahoma, and in connection with this petition, the petitioner herewith presents his assignment of errors.

The petitioner further prays that the amount of the bond for costs to be given by him upon allowance of such writ of error may be fixed by an order to be entered herein.

Streeter B. Flynn and Chas. H. Garnett, Attorneys for Plaintiff in Error.

Writ allowed this 20th day of July, 1925, Bond fixed at $250.00 conditioned as the law directs.

John H. Cotteral, Judge of the District Court of the United States for the Western District of Oklahoma.

In United States District Court

Assignments of Error—Filed July 20, 1925

And now comes W. C. Tucker, the plaintiff above named and plaintiff in error upon the proceedings in error in the [fol. 79] Circuit Court of Appeals for the Eighth Circuit, by Chas. H. Garnett, his attorney, and in connection with his petition for a writ of error, says that in the record and proceedings and in the final judgment heretofore entered in this cause manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

1. The court erred in overruling the motion of the plaintiff in error, plaintiff below, for a judgment in his favor made at the conclusion of the evidence on the trial.

2. The court erred in sustaining and granting the motion of the defendant in error, the defendant below, for a judgment in his favor made at the conclusion of the evidence on the trial.

3. The court erred in refusing to find and include a good will value of at least $100.00 a share in the fair market value of the stock of the plaintiff in error in the Osage Mercantile Company on March 1st, 1913, and in refusing to take such fair market value as the basis for determining the plaintiff's gain or loss on his said stock on liquidation of the said corporation on July 20, 1920.

4. The court erred in finding that whatever good will was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders with the distribution in kind of its tangible assets to them.

5. The court erred in finding that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.43 declared from surplus earned prior to March 1, 1913, were to be excluded from the assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as a basis for determining the gain realized by the plaintiff at liquidation of said company on the stock held by him.

6. The court erred in not rendering judgment for the plaintiff in error for the sum of $6,642.13 with interest

thereon at the rate of six per centum per annum from October 30th, 1923, and costs of the action.

7. The court erred in not rendering judgment for the plaintiff in error for the sum of $216.26 with interest thereon at the rate of six per centum per annum from October 30th, 1923, and costs of the action.

8. The court erred in rendering judgment for the defendant in error for costs.

[fols. 80 & 81] 9. The court erred in that its judgment is not supported by, but is contrary to, its findings of fact.

10. The court erred in that its judgment is not supported by, but is contrary to, the evidence.

11. The court erred in that its judgment is contrary to law.

By reason whereof, the plaintiff in error prays that the judgment aforesaid may be reversed and the cause remanded to the said trial court with directions to enter its judgment therein in favor of the plaintiff in error and against the defendant in error for the sum of $6,642.13 with interest thereon at the rate of six per centum per annum from the 30th day of October, 1923, and for his costs in the action, or that it be reversed and remanded with directions to the said trial court to grant a new trial.

Streeter B. Flynn and Chas. H. Garnett, Attorneys for Plaintiff in Error.

Bond on writ of error for $250.00, approved and filed July 20, 1925, omitted in printing.

[fol. 82] In United States District Court

Præcipe for Transcript of Record—Filed July 24, 1925

The clerk of the above entitled court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for use in the United States Circuit

Court of Appeals for the Eighth Circuit, by including therein the following:

I. The Petition.

II. The Answer.

III. The Bill of Exceptions.

[fol. 83] IV. The Plaintiff's Motion for Judgment at the Conclusion of the Evidence.

V. The Defendant's Motion for Judgment at the Conclusion of the Evidence.

VI. The Journal Entry of Judgment.

VII. The Assignments of Error.

VIII. The Petition for Writ of Error and Order Allowing same and Fixing Cost Bond.

IX. The Writ of Error.

X. The Bond for Costs.

XI. The Citation.

XII. The Præcipe For Transcript and Election to Print Record.

The plaintiff in error also hereby elects to have the record in the said cause printed under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 21st day of July, 1925.

Streeter B. Flynn and Chas. H. Garnett, Attorneys for Plaintiff in Error.

Service of the within and foregoing præcipe is hereby acknowledged and accepted on behalf of the defendant in error, and the defendant in error hereby waives the designation of any additional parts of the record in said cause to be included in the transcript ordered in the said præcipe and consents that the said transcript shall be made up of and shall contain the parts of the record designated in the said præcipe.

Dated this 21st day of July, 1925.

James A. Ingraham, Assistant United States District Attorney for the Western District of Oklahoma.

[fol. 84] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 85] Appearances of counsel omitted in printing.

[fol. 86] Minute entry of argument and submission January 21, 1926, omitted in printing.

[fol. 87] In United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1926

No. 7124

W. C. Tucker, Plaintiff in Error,

vs.

Acel C. Alexander, Collector of Internal Revenue, Defendant in Error

In Error to the District Court of the United States for the Western District of Oklahoma

Mr. Charles H. Garnett for plaintiff in error.

Mr. Frederick W. Dewart, Special Attorney, Bureau of Internal Revenue (Mr. Roy St. Louis, United States Attorney, Mr. William P. Kelley, Assistant United States Attorney, and Mr. A. W. Gregg, Soliciter of Internal Revenue, were with him on the brief), for defendant in error.

Before Stone, Van Valkenburgh, and Booth, Circuit Judges

Opinion—Filed October 27, 1926

Stone, Circuit Judge, delivered the opinion of the court.

This is an action for refund of a portion of a tax, paid under protest, on the income of plaintiff in error (plaintiff below) for the year 1920. Plaintiff made a tax return for that year and paid upon the basis thereof. An investigation by an agent of the Department, thereafter, resulted in an additional assessment, which was paid under protest,

In due time after this last payment, plaintiff filed his claim for refund. After waiting seventeen months, in vain, for some action thereon by the Department, this action was [fol. 88] brought. About six months after this action was begun and before trial thereof, the Department made an allowance of $216.26 (a small part of the claim) and rejected the balance of the claim. From a judgment favoring defendant but without prejudice to acceptance by plaintiff of the allowance of $216.26, this writ of error is sued out.

In the view which we take of the issues which must determine this case, an extended statement of fact is unnecessary.

Prior to 1913, plaintiff was half owner of the stock of a corporation which had, for some years, been engaged in a general merchandise business at Pawhuska, Oklahoma. In 1920, the corporation was voluntarily dissolved and the assets distributed in kind to plaintiff and his brother (who owned the other half of the capital stock), the two men assuming the existing indebtedness of the corporation. As half owners, the brothers continued the business as a copartnership. The income upon which the additional tax (refund of which is now sought) was collected was the increased value of the corporate stock from March 1, 1913, to the date of liquidation in 1920.

There are two main contentions here. One is of minor importance, concerning costs herein.

The important contention is in respect to collection of an income tax assessed upon the liquidation of the Osage Mercantile Company, of which Tucker was a stockholder. The main grounds for recovery thereof, as stated in the petition, are:

"That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300

shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed [fol. 89] in specie to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took $356.86 per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders."

The collector contends that the plaintiff cannot recover upon such grounds because they are different from those asserted in his claim of refund. The claim of refund is general in terms and is to the effect that there was a loss instead of a profit, but it is made specific through an incorporation, by reference, of a letter from the deputy Commissioner which sets forth the grounds of protest actually urged to payment of the tax. Those grounds were as follows:

"The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full

amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report."

It appears, therefore, that the grounds relied upon in the petition for refund are entirely different from those contained in the Claim for Refund. Hence, the above point raised by the Collector must be determined. We think the Collector is right for the reasons following:

[fol. 90] This is a suit against the Government in connection with the imposition and collection of the general revenue, which is a prime governmental function; such character of actions can be maintained only when permitted by the sovereign and only upon the conditions imposed by the sovereign. Such character of action is permitted by the statute but certain conditions are required as a condition precedent thereto. One of these conditions is that a claim for refund shall first be made to the Commissioner of Internal Revenue and a period of six months allowed for his determination thereof. The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated. The resort to the courts is allowed only because the Commissioner will not correct the wrong claimed to have been done. The purposes of requiring the claim and the object of the resort to the courts would be in part or wholly defeated unless the claim contained all of the grounds relied upon by the claimant. Therefore, we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the Claim. As no ground in this petition is stated in the Claim for Refund, we think this petition has no standing under the issues tendered by the petition and that the determination of the court as to this major claim was correct.

The minor claim affects only costs and arises out of the the fact that the Commissioner allowed a refund of $216.00. The tax was paid, under protest, on October 30, 1923; the claim for Refund was filed early in November, 1923; this action was filed October 7, 1924; the ruling and above refund on the claim was made by the Commissioner April 24, 1925. The Commissioner had, under the Statute, six months after the claim was filed within which to determine the Claim and within which time plaintiff could not bring suit. As the Commissioner did not act within that period, the plaintiff was within his rights in bring suit. If he had based his suit upon any ground contained in the Claim and the above refund had been all or a part of the sum claimed under such ground, we think the plaintiff would have been entitled to his costs herein. But no refund of the above sum could have been secured under this petition; it was not [fol. 91] secured because of the suit nor would the early announcement of such refund have obviated necessity for the suit nor have prevented it being brought. Under these conditions, we think the plaintiff has no right to his costs herein.

The judgment should be and is affirmed.

[fol. 92] In United States Circuit Court of Appeals

[Title omitted]

Judgment—November 1, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Acel C. Alexander, Collector of Internal Revenue, have and recover against W. C. Tucker the sum of Twenty Dollars for his costs herein and have execution therefor.

[fol. 93] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR STAY OF MANDATE

Comes now W. C. Tucker, the plaintiff in error in this proceeding, and moves and asks the Court to make and enter herein its order staying the issuance by the clerk of the mandate of this court to the court below upon the decision and judgment rendered herein by this Court on the 27th day of October, 1926, until the further order of the Court [fol. 94] in respect to the issuance thereof.

As grounds for his motion the plaintiff in error says that he has prepared and is filing with this motion a petition for rehearing upon the issues presented to this Court in this proceeding, and that he verily believes that there is substantial merit in said petition for rehearing and that the same should be granted.

And also that he is preparing, and will present within the time limited for doing so, a petition to the Supreme Court of the United States for review on writ of certiorari of the said decision and judgment of this Court in this proceeding.

And also that there is no pressing reason why the said mandate from this Court should be issued immediately, for that the judgment of the lower court, which is affirmed by this Court, was in favor of the defendant in error and against the plaintiff in error for costs, and that the plaintiff in error was plaintiff below, and as such made and maintained a sufficient deposit to cover all costs incurred in said court, and as plaintiff in error in this court has made and maintained a cost deposit sufficient to cover all costs incurred in this court, and that all costs incurred by him, both in the court below and in this court, have been paid as incurred, and likewise all costs incurred by the defendant in error, both in the court below and in this court, have been paid as incurred out of the cost deposits made and maintained by the plaintiff in error for that purpose.

There is, therefore, no relief to be obtained by the defendant in error upon the issuance of the said mandate and [fol. 95] the receipt and filing of it in the court below, and no detriment to be suffered by the defendant in error or

anyone else by reason of delay in the issuance of the said mandate. Hence, it would seem that it is entirely right and proper that this Court should withhold the issuance of its mandate and retain jurisdiction in this proceeding to reconsider its said judgment and decision upon the petition for rehearing of the plaintiff in error for that purpose, and if it should be deemed right and proper to modify its present decision and judgment or to recall and vacate the same upon rehearing and render a new and different decision and judgment as prayed for by the plaintiff in error.

Wherefore, the plaintiff in error prays that his said motion for an order staying the issuance of the mandate of this Court in this cause until the further order of this Court in the premises be sustained and granted and such order made.

Chas. H. Garnett, Attorney for Plaintiff in Error.

[fols. 96 & 97] Petition for rehearing, covering two pages, filed December 24, 1926, omitted from this print. It was denied and nothing more by order January 15, 1927.

[fol. 98] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing and Staying Issuance of Mandate—January 15, 1927

This cause came on this day to be heard upon the petition for a rehearing and for a stay of the mandate of this Court, filed by counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

It is further ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for a period of 40 days from and after this date pending a petition to the Supreme Court of the United States for a writ of certiorari, unless said petition shall have been sooner disposed of.

[fol. 99] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 100] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 7, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.